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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

KULUKUNDIS *v.* NORWICH UNION FIRE INSURANCE SOCIETY.

[1934. K. 317.]

C. A.
1936
Mar. 10, 11, 12, 13, 16, 17, 19;
May 15;
June 30.

Insurance (marine)—Insurance on freight—Commercial loss of vessel—Temporary repairs exceeding repaired value—Loss of freight—Interest on sum recovered.

The plaintiffs took out a policy with the defendants in respect of the freight on the carriage of a grain cargo from the West Coast of South America to United Kingdom ports. The vessel loaded her cargo and started on her voyage in December, 1933, but shortly afterwards went ashore in the Straits of Magellan. She was later taken off by a salvage company on the terms that they should be paid 11,000*l.* in the event of success. The hull underwriters and the plaintiffs agreed to abandon the voyage on a payment by the underwriters, and the ship was abandoned to the salvors. The cargo owners were notified that the adventure

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was at an end and their underwriters paid as on a total loss. On a claim by the plaintiffs under the freight policy it appeared that the cost of temporary repairs to the vessel, sufficient to carry her to her destination, would exceed her repaired value:—

Held, that the plaintiffs were entitled to recover as for a total loss of chartered freight on the ground (per Slesser and Greene L.JJ.) that it was shown that the cost of temporary repairs would exceed the repaired value of the vessel; on the ground (per Scott L.J.) that there was an actual commercial loss of the vessel within the meaning of the charterparty, or, alternatively, on the ground that in the circumstances known at the time to the plaintiffs, their decision to treat it as an actual loss was justified under the charterparty contract and under the policy.

Per Scott L.J.: Under a contract of affreightment transhipment is a privilege or liberty of the shipowner, and not a duty. An insurance policy on chartered freight is concerned only with the named ship, the insurance being against inability to carry the cargo to its destination in that ship.

Held, further, that the plaintiffs were entitled to interest at 4 per cent. on the amount recovered as from March 1, 1934.

Decision of Porter J. reversed.

APPEAL from a decision of Porter J.

The plaintiffs, the owners of the *Mount Taygetus*, sued the defendants for a total loss of freight under a policy issued by the defendants for 865*l.*, part of a total sum insured of 8000*l.*

The policy, which was in respect of the freight on a carriage of grain from the West Coast of South America to United Kingdom ports, was subject to the Institute Voyage Clauses—Freight, cl. 5 of which provided that "in ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship [25,000*l.*] shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

The vessel completed loading her cargo of grain and started on her voyage, but shortly afterwards went ashore in the Straits of Magellan. She was later taken off by a salvage company who agreed with the master, on terms of "no cure no pay," that they should be paid 11,000*l.* in the event of success, a further claim not exceeding 9000*l.* to be the subject of arbitration.

The hull underwriters and the plaintiffs agreed to abandon the voyage on the terms that the underwriters should pay the plaintiffs 7500*l.*, and the ship was abandoned to the salvors. The cargo owners were notified that the adventure was at an end, and some 100 tons of cargo were jettisoned. The cargo owners accepted the notice and their underwriters paid as on total loss of cargo.

Repairs to the vessel were carried out by the salvors to enable her to proceed to a Continental port, and she sailed for Rotterdam with 4250 tons of her original cargo, and there she was sold by the salvors for breaking-up, and she was in fact broken-up.

Originally the plaintiffs based their claim on the grounds (1.) that they had suffered a total or constructive total loss of the freight, because the ship had become a total or a constructive total loss by a peril insured against and was abandoned to the underwriters on cargo, who accepted notice of abandonment, and that the venture was terminated at Magallanes, or (2.) that the venture contemplated by the charterparty was frustrated. In the Court of Appeal, however, the plaintiffs, in view of the decision in *Carras* v. *London & Scottish Assurance Corporation* (1), amended their claim, basing it upon the footing that the freight was lost by perils of the sea, inasmuch as, when the agreed figures were considered, no prudent person, if uninsured, would, in the circumstances, incur the expense of repairing the ship so to make it possible to complete the contract voyage and deliver the cargo. The figures were as follows: Cost of temporary repairs, 19,161*l.*, including release of salvors' lien. As against this the plaintiffs could at most receive 6500*l.* for the repaired ship, 5278*l.* net freight, if that could properly be included, and 7201*l.* as a contribution by the cargo towards the repairs, making 18,979*l.* in all—a sum less than the necessary expenditure.

PORTER J. in the course of his judgment said: Can one say that the freight is totally lost because the expense of earning it is greater than the freight at risk? A proposition so widely

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(1) [1936] 1 K. B. 291.

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stated could not, of course, be justified. The freight might cost more to earn than its value when earned even though no casualty had occurred; in other words, the shipowner might merely have made a bad bargain. The question should, I think, rather be: Has the freight been totally lost by reason of a casualty insured against? In considering the question so put, I do not think that the expense which the shipowner incurs in earning the freight need be considered. The freight insured is the gross freight. The cost of earning the freight is not the result of a casualty, but is an ordinary incident of every voyage. . . . . I have dealt so far separately with the three contentions that there was a total loss of freight because of the expense (1.) to which the ship would be put; (2.) to which the cargo would be put; and (3.) to which the freight would be put. Individually, in my opinion, no one of these matters causes a total loss of freight, nor do I think that it makes any difference if in considering the loss incurred one has regard to all or any of the three interests in combination. He accordingly held that the claim for total loss of freight failed, and he further held that the claim for a partial loss of freight also failed.

The plaintiffs appealed.

Willink K.C. and *Cyril Miller* for the appellants. Porter J. was wrong in holding that the claim for loss of freight was not maintainable. There was a loss of the commercial purpose of the adventure by perils of the sea: *Jackson* v. *Union Marine Insurance Co.* (1) In that case the question was as to the time for repairs, whereas here the question is as to their cost. By what happened to the vessel by perils of the sea it was impossible in a business sense for her to continue the voyage so as to earn the freight. In *Carras* v. *London & Scottish Assurance Corporation* (2) it was held that as, owing to perils of the sea, the ship could not make the cancelling date or be tendered according to contract to the charterers, there was an actual total loss of freight; in the present case the same principle applies, the chartered ship having been

(1) (1874) L. R. 10 C. P. 125. (2) [1936] 1 K. B. 291.

damaged so seriously as to be unable to proceed. A shipowner is not bound to forward goods in another ship; his contract is to carry them in the chartered vessel: see Scrutton's Charterparties and Bills of Lading (13th ed.), p. 315; Carver's Carriage by Sea (7th ed.), s. 304.

[SLESSER L.J. It is said in *Matthews* v. *Gibbs* (1) that when a shipowner finds that by some vis major he is prevented from carrying out his contract in the particular ship, it is open to him to forward the goods in a substituted ship upon the most advantageous terms to himself which the circumstances admit of.]

That is a liberty of which he may, if he choose, avail himself; it is not a duty: *De Cuadra* v. *Swann* (2), where it was decided that when a ship is so seriously damaged as to be incapable of repair so as to prosecute the adventure except at an expense exceeding her value together with the freight when repaired, the master is justified in abandoning the voyage, and is not bound to send the goods on in another ship. In *Assicurazioni Generali* v. *Bessie Morris Co.* (3) it was held that where a ship which was to proceed to a port of discharge and there deliver the cargo had to put into a port of refuge for repairs, the shipowner was liable in damages for abandoning the voyage at that port without the consent of the charterers, unless the effect of the excepted perils proved to have been such as to make it either physically impossible to complete the voyage, or so clearly unreasonable as to be impossible in a business point of view. See also *Rankin* v. *Potter* (4), where Lord Chelmsford said that "the sea damage was such as would have justified an abandonment and claim for a constructive total loss. By this I understand that the amount of damage was such that a prudent uninsured owner would not have incurred the expense of repairing the ship. And this appears clearly from a further admission . . . . that the cost of repairing the vessel at Calcutta, so as to make her seaworthy for carrying a cargo to England, would have exceeded the value of the ship when repaired,

(1) (1860) 30 L. J. (Q. B.) 55, 62.
(2) (1864) 16 C. B. (N. S.) 772.
(3) [1892] 2 Q. B. 652.
(4) (1873) L. R. 6 H. L. 83, 155.

plus the difference between the chartered freight and the current freight. . . . . No prudent man would, in such a state of things, incur the expense of repairing the ship ; and the shipowners electing not to repair were entitled to consider the charter at an end, and the chartered freight as totally lost by a peril of the sea." Those observations apply exactly to the present case. As to the standard of repair to be taken into account : it was said in the *Bessie Morris* case (1) by Lord Esher M.R. that "if the cost of the repairs necessary to enable her to complete the voyage contracted for would be more than the benefit which the owner would derive from them, then it would be impossible in a business sense to repair her." Before Porter J. there was no evidence as to the cost of full repairs ; the evidence was as to the cost of temporary repairs sufficient to enable the ship to complete the contract voyage. The cost of temporary repairs can alone be regarded, and it being clear that these would have exceeded the value of the ship when repaired it was impracticable in a business sense to repair her. The appellants are therefore entitled to recover on the policy.

Le Quesne K.C. and *W. L. McNair* for the respondents. The Court is invited to allow this appeal on the ground that in the circumstances arising out of the casualty the shipowners were prevented by perils of the sea from carrying the goods to the agreed destination, and the Court is asked to accept the findings of the Court of Appeal in *Carras* v. *London & Scottish Assurance Corporation* (2) that the dispute as between the shipowner and freight underwriters is to be determined on the basis of the relation between shipowner and charterer ; that is to say, that the shipowner will succeed against the freight underwriters if he can show that he was prevented by an excepted peril from carrying on the goods to their destination. In *Carras* (2) the freight at risk was chartered freight ; here the freight at risk was on goods which had been shipped ; in *Carras* (2) the shipowners showed a constructive total loss by going into the question of the cost of permanent repairs. Here nothing of that kind was attempted,

(1) [1892] 2 Q. B. 652, 658.

(2) [1936] 1 K. B. 291.

the shipowners confining themselves to the cost of temporary repairs and the value of the ship if these had been carried out. *Jackson* v. *Union Marine Insurance Co.* (1) has no bearing upon this case. There the Court was not concerned with any question of expense; here we are. A shipowner is excused from the further performance of his contract if, and only if, he can show that by reason of a casualty he has lost, actually or constructively, the means of carrying on the goods, thereby losing the opportunity of earning the freight. In *Rankin* v. *Potter* (2) Mellor J. quoted with approval the opinion expressed by Lush J. in the Court of Exchequer Chamber thus: " That which in the language of maritime commerce constitutes a loss of a ship, is damage to an extent which renders the ship not worth repairing, followed by a determination not to repair. As respects her capacity to earn freight, a ship in such condition is as much lost to the owner as if it had sunk or broken up." In the *Bessie Morris* case (3), as is pointed out in Scrutton on Charterparties and Bills of Lading (13th ed.), p. 113, n. (p): " on the shipowner's claim to put an end to the charter, the question was their [the repairs] expense. The decision that he must prove commercial impossibility to repair (i.e., commercially, destruction of the ship) illustrates the connection of these cases as to frustration with cases as to destruction of the subject-matter of a contract, like *Taylor* v. *Caldwell.* (4) " When in the *Bessie Morris* case (3) Lord Esher M.R. referred to the duty of a shipowner to repair if it is possible in a business sense to do so, he makes no reference to the cost of temporary repairs. Nor is there any reference to these in *Moss* v. *Smith* (5), or in *Philpott* v. *Swann.* (6) The question always is: has the shipowner been prevented in a business sense from earning his freight? He is so prevented if the vessel is so damaged that the cost of repairing her would exceed her market value when repaired; but that does not mean partially repaired, it means fully repaired. Moreover, in this case the cargo could have been transhipped and the freight earned.

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(1) L. R. 10 C. P. 125.
(2) L. R. 6 H. L. 83, 110.
(3) [1892] 2 Q. B. 652.
(4) (1863) 3 B. & S. 826.
(5) (1850) 9 C. B. 94.
(6) (1861) 11 C. B. (N. S.) 270.

[They also cited *Irving* v. *Manning* (1); *Chapman* v. *Benson* (2); *Rosetto* v. *Gurney* (3); and *Tennants* (*Lancashire*) v. *Wilson & Co.* (4)]

Willink K.C. replied.

Cur. adv. vult.

May 15. The following judgments were read :—

Slesser L.J. The facts material to a determination of the present appeal are as follows :—

The plaintiffs were the owners of a steamship called the *Mount Taygetus;* they claim under a freight policy dated November 22, 1933, from the defendants on the basis of total loss of freight. The voyage insured is expressed in the policy to be from Liverpool "to any port or ports in the Bristol Channel whilst there and thence to Rio de Janeiro whilst there and thence in ballast (via Magellan) to grain ports on the West Coast of South America whilst there and thence (via Magellan) to any port or ports in the United Kingdom and/or on the Continent of Europe (not north of Hamburg inclusive) and/or in the Mediterranean and/or Adriatic Seas or held covered. With leave to call touch and/or stay as required."

The sum in question here is 865*l.*, part of a total sum insured of 8000*l.* The subject-matter covered by the policy is the carriage of grain, etc., of the amount of 7000 to 8000 tons under a charterparty dated November 2, 1933, from four free loading ports on the West Coast of South America to four United Kingdom ports. The policy was subject to the Institute Voyage Clauses—Freight—and contained the familiar clause that in ascertaining whether the vessel is a constructive total loss, the insured values in the policies on ship shall be taken as the repair value and nothing in "respect

(1) (1846–7) 2 C. B. 784; 6 C. B. 391.

(2) (1847) 5 C. B. 330.

(3) (1851) 11 C. B. 176.

(4) [1917] A. C. 495, 510.

of the damaged or break-up value of the vessel or wreck shall be taken into account"; which clause was recently considered in relation to a freight policy in *Carras* v. *London & Scottish Assurance Corporation.* (1) The insured value on the hull policy was 25,000*l.* The charterparty, which I have mentioned, contained the exception that the steamer was to be in no way liable for perils of the sea.

The steamer completed her loading of cargo on the West Coast of South America on December 16, 1933, and sailed for the United Kingdom from a fourth port where she bunkered on December 19. On December 23, while in the Straits of Magellan, she suffered casualty and went ashore on Memphis Rock. There she remained until fourteen days later, when she was taken off by the Magallanes Salvage Company. By them the steamer was brought under her own steam to Magallanes, arriving on January 13, 1934. The salvage company had agreed with the master on terms of "No cure no pay," that for this service 11,000*l.* should be paid in the event of success, a further payment claimed not exceeding 9000*l.* to be the subject of arbitration.

On February 5, 1934, the hull underwriters and the plaintiffs agreed to abandon the voyage on the terms that the hull underwriters should pay the plaintiffs 7500*l.*, and the ship was abandoned to the salvors. The cargo owners were notified that the adventure was at an end, and some 100 tons of cargo was jettisoned, and the cargo owners accepted the notice and their underwriters paid, as on total loss of cargo.

Repairs to the vessel were then carried out by the salvors to enable her to proceed to a Continental port, and she sailed for Rotterdam in May, 1934, with 4250 tons of her original cargo. At Rotterdam she was sold by the salvors for breaking-up and was, in fact, broken-up.

The claim of the plaintiffs on the policy, as for a total loss of freight, was originally advanced in a manner different from that which has been argued in this Court, for, in the pleadings, the plaintiffs contended that they had suffered a total or constructive total loss of the freight because either the steamship cargo had become a total or constructive total loss by a peril insured against and was abandoned to underwriters on cargo who accepted notice of abandonment and that the venture was terminated at Magallanes, and with the assent of underwriters on hull; the plaintiffs on February 5, 1934, through their master abandoning the steamship to the salvors (para. 4) or, by way of amended plea, it was contended that the venture contemplated by the charterparty was frustrated.

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(1) [1936] 1 K. B. 291.

On neither of these grounds did the plaintiffs found their present appeal, but rather upon the footing that the freight was lost by perils of the sea which, they now contend, if proved, is sufficient for their purpose. This change of front, they say, has been occasioned, at any rate in part, by the decision of this Court in *Carras* v. *London & Scottish Assurance Corporation* (1), which decided that when it was clear from the facts that a freight contract between the shipowners and the charterers was discharged by perils of the sea, it was not material to consider whether the vessel was a constructive total loss, though the question to be solved might involve the ascertainment of some facts which would fall to be determined when a claim was based on a hull policy. We thought, having regard to all the circumstances, that the appellants should not be precluded from arguing this appeal on the ground which they now advance, and the Court admitted an amended statement of claim to enable them so to do.

This amended ground upon which the appellants contend under the charterparty and freight policy that the shipowners have been prevented in a business sense from performing the freight contract by perils of the sea is that when the agreed figures in the case are considered, it appears that no prudent man, if uninsured, would in such a state of things as is here disclosed, incur the expense of repairing the ship so as to make it possible to complete the contracted voyage and deliver the cargo.

The only cost of repairs which was agreed between the parties before and at the trial was "temporary repairs to

(1) [1936] 1 K. B. 291.

enable the voyage to be completed," and it is contended by Mr. Le Quesne that such an agreed basis of cost of repair is not a right criterion, but that the cost of repairs sufficient to put the ship back into the position in which it was before the casualty, or at any rate a cost sufficient to effect permanent reparation, should be the sum to be taken into account as part of the necessary expenditure as the result of that casualty, and that against that should be set the value of the ship so fully repaired; no consideration to be given to the sum which would be earned in freight by the contracted voyage. He points out that neither by agreement nor by evidence was the cost of such full repair to the ship determined before the learned judge, and that it is not possible nor right that, at this stage, such an inquiry should be entered into. On the other hand, if the cost of repairs, sufficient for the voyage, which have been called "temporary repairs," are to be taken as the only necessary element in considering whether a prudent uninsured owner would incur them, there can be no doubt, on the agreed figures, that no prudent uninsured owner would have ordered such repair. The sum which the shipowner would have to expend on a basis of temporary repair, including the release of the salvors' lien, would be 19,161*l.*; whereas, at the highest, all he could hope to get would be 6500*l.*, the value of the so temporarily repaired ship, together with the net freight, if that be properly included, of 5278*l.*, and, at the most, a contribution by the cargo towards the repair of 7201*l.*, making 18,979*l.* in all, a sum less than the necessary expenditure. If the freight be excluded from the benefit of his repair and if the cargo's contribution be assessed on the value of the cargo in January at the time of the casualty, rather than in May, the sum to be credited to the shipowner would be only about 11,200*l.*; if the freight be included and the cargo estimated as in January the sum would be 16,476*l.*—in any event, therefore, the temporary reparation would not be commercially practicable. The proportions attributable to this particular cargo produce a similar result.

In these circumstances, excluding all matters which have now been decided in this Court in *Carras* v. *London & Scottish Assurance Corporation* (1), the question for determination, though a difficult one, lies within the narrow compass—what has to be decided is, whether in making the computation, the costs of repairs sufficient to complete the voyage are to be the subject of consideration or the costs of repairs sufficient permanently to restore the ship regardless of the specific obligation of carriage.

In my view, when the matter is fully considered, it emerges that this question has already been decided by authority. To quote the speech of Lord Chelmsford in *Rankin* v. *Potter* (2) (also a case of freight insured, where it was stated that the cost of repairs were those necessary to make the ship seaworthy and enable it to bring home its cargo): "A plain and clear view upon the facts and circumstances of the case can only be obtained by removing the policy on the ship out of the way, and looking at the case as if there were no other policy in existence but that on freight . . . . the only question is whether by the perils of the sea the ship was so damaged . . . . during the term of the policy, as to be rendered incapable, unless sufficiently repaired, of performing the voyage . . . . for which she was chartered." And, again later, he refers to "an admission stated in the report of this case in the Court of Common Pleas, viz., that the cost of repairing the vessel at Calcutta so as to make her seaworthy for carrying a cargo to England would have exceeded the value of the ship when repaired," and gives judgment upon that assumption. Lord Hatherley speaks to the like effect (3) in agreement with the views of Brett and Blackburn JJ. (4)

In the whole of the authorities, which are so fully discussed by my brother Greene that I do not mention them in detail, I can find no suggestion of any standard of the extent of repair on a freight policy, whatever may be the case of hull policy, other than that stated by Lord Chelmsford and the other learned Lords and judges in *Rankin* v. *Potter* (5)—

(1) [1936] 1 K. B. 291.
(2) L. R. 6 H. L. 83, 155.
(3) L. R. 6 H. L. 163.
(4) Ibid. 104, 117.
(5) Ibid. 83.

namely, that of sufficient repair to perform the voyage for which the ship was chartered. In *Moss* v. *Smith* (1), where an action was brought both on a policy on ship and on chartered freight, Maule J. (2), speaking of the freight policy, said: "The only loss in question here, is, a loss of freight as incident to the loss of the ship. If the ship was irreparably damaged—considering the damage to be irreparable in the view I have mentioned, and which I take to be well established—to the extent that she could not bring home any part of the cargo, then that would be a total loss of freight. If the ship was damaged to such an extent only that she might have been repaired so as to have been able to bring home part of the cargo, but not the whole, then there would be a total loss of that part of the freight which the ship was thus incapacitated from earning," the test being whether the vessel could be commercially repaired so as to bring home the whole or part of the cargo. In the same case Cresswell J. said (3): "Now, what is the contract of the underwriter? That the owner shall not be deprived of his freight by perils of the sea. The jury have in this case found that the ship might have been repaired at an expense such as a prudent owner, uninsured, would have incurred, regard being had to the value of the ship, and that the ship would have been enabled by that expenditure to earn the freight." Wilde C.J. (4) speaks of the "known and recognized principle, that a ship is prevented from performing her voyage, and, consequently, from earning freight, when she has sustained damage which can only be repaired at an expense which no prudent owner, uninsured, would incur"—he refers to the evidence on behalf of the plaintiffs—"of what would have been the cost of the repairs which would have been necessary to enable the ship to pursue the voyage." These dicta all indicate that, in freight insurance, the temporary expenditure necessary to earn the freight—that is, to complete the voyage—is the true criterion.

In *Assicurazioni Generali* v. *Bessie Morris* (5) Lord Esher speaks

(1) 9 C. B. 94.
(2) Ibid. 103.
(3) 9 C. B. 106.
(4) Ibid. 109.
(5) [1892] 2 Q. B. 652, 658.

of "the cost of the repairs necessary to enable the ship to complete the voyage contracted for." And Bowen L.J. (1) speaks of the vessel being "put into a condition fit for the performance of her voyage."

In the light of these weighty and almost unanimous dicta, I do not find it necessary to go further into this matter. Had I to decide the matter free from past authority, looking at the substance of the contract, which is to carry the freight, I should have come to the same conclusion as have so many learned judges; but in this case I feel that I can rest securely, apart from any fresh consideration, upon clear and binding authority.

This appeal succeeds, with costs here and below.

GREENE L.J. The substantial question which arises for decision upon this appeal is whether the appellants are entitled to recover as for a total loss of chartered freight, upon proof that the cost of temporary repairs to the vessel, sufficient to enable her to carry her cargo to its destination, would have exceeded her repaired value; or whether, in the absence of proof that the cost of permanent and complete repairs would have exceeded the repaired value of the vessel, the appellants are bound to fail. In so stating what appears to me to be the substantial question in issue, I do not forget the argument which was addressed to us on behalf of the appellants, that the test to be applied is a more fundamental one than a mere comparison between the cost of repair and the value of the repaired vessel, and involves, or at any rate permits, a general inquiry as to what a prudent uninsured owner would have done in the circumstances, an inquiry upon which other matters of evidence may be relevant in addition to the factors of cost and value. Upon the view which I take of this case, it is not necessary to decide whether or not this argument is well founded.

In this judgment I use the phrase "cost of repairs" as including the cost of freeing the vessel and her cargo from the salvors' lien and other expenses necessary to be incurred to enable her to proceed on her voyage, as to which there is no dispute, less the estimated general average contribution to be made by the cargo. There is a subsidiary question whether for the purpose of the calculation the shipowner should be debited with the freight which would have been earned, and, if so, whether it should be the gross freight including the portion prepaid, or only the unpaid portion of the freight less the cost of earning it. I will deal shortly with this subsidiary question at the conclusion of my judgment.

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(1) [1892] 2 Q. B. 660.

It is remarkable that there should be no authority directly covering the question whether permanent or temporary repairs are to be taken as the test in such a case as the present. The reason may well be that in many cases the distinction is in practice an academic one. If a vessel, when temporarily repaired, is worth less than the cost of the temporary repairs, it is likely that her value, if permanently and completely repaired, would be less than the cost of so repairing her, particularly if to that cost is added the cost of the temporary repairs necessary to enable her to reach a port where she can be permanently and completely repaired. Moreover, in former times, if a vessel suffered serious sea damage at a distant place, the repairs necessary to enable her to reach home would in many cases have been of necessity repairs of a permanent and complete nature. But in the present case the distinction is of vital importance, and the question falls directly to be decided.

Upon the principle recently reaffirmed by this Court in *Carras* v. *London & Scottish Assurance Corporation* (1) a shipowner, in which expression I include a charterer by demise, is entitled to claim against his freight underwriter as for a total loss of freight, if the vessel suffers such sea damage as will free the shipowner from his obligation under the contract of affreightment to carry the cargo to its destination, provided, of course, that the cargo is not in fact carried either by the shipowner himself or by abandonees of ship so as to earn the freight. There may be, perhaps, a further exception where transhipment, although optional to the

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shipowner, is a reasonable and practicable course. But for the purposes of this judgment I can disregard these exceptional cases, which do not affect the principles involved.

Where the damage can be repaired and no question as to the cost of repairs arises, no difficulty is presented, although in discussing the principles involved I shall have to examine this case. The difficulty arises where the cost of repairs would be so unreasonable as to justify the shipowner in refusing to incur it, in which case the vessel is said to be lost in a commercial sense.

In considering this question of commercial loss in a case between shipowner and freighter, it appears to me that nothing but confusion results if it is treated as the same question as that of commercial loss as between shipowner and hull underwriter, that is, constructive total loss of ship. It may or may not be the case (I know not) that as a matter of history the conception of commercial loss first appeared in cases between owner and hull underwriter, and that it was afterwards applied to cases between owner and freighter and owner and freight underwriter. Whether this be so or not is, in my judgment, immaterial. The rule that a shipowner is entitled to be freed from his obligations to the freighter, if the vessel is lost in a commercial sense, is now well established, and it cannot in my judgment be treated as the same rule, or a branch of the same rule, as that which applies between owner and hull underwriter. It stands on foundations of its own, and its scope and effect must be ascertained accordingly.

There is, indeed, a fundamental difference between the circumstances in which the two rules operate. In the case of shipowner and freighter the rule as to commercial loss operates to excuse the shipowner from performance of a contract. The shipowner's obligation under that contract is to carry the cargo to its destination. If the ship is damaged and yet capable of repair, it is his duty to repair it. The rule as to commercial loss in cases where it applies operates to free him from this duty. Whether it be a rule of construction or a rule under which a term is implied in the contract of affreightment, it is a rule which excuses the shipowner from what is prima facie his duty, and its scope must in my judgment be determined with reference to this fact. The importance of this will appear later.

In the case of constructive total loss under a hull policy, on the other hand, no question of the duty of the shipowner to carry the cargo arises. The contract here is a totally different contract, and there seems to be no ground in logic for assuming that the facts, which will constitute a commercial loss for the purposes of the one contract, are necessarily the same as those which will constitute a commercial loss for the purposes of the other. If there are analogies between the two cases, they are analogies and nothing more, and must not be allowed to distract the mind from what, as it appears to me, is the correct method of examining each rule—namely, to examine it with reference to the particular type of contract of which it forms part. I will now proceed to the best of my ability to examine in this way the rule as to commercial loss as between owner and freighter. As a necessary preface to this examination I must first of all offer some observations as to the effect of sea damage in general upon the contract of affreightment.

In the first place, the damage to be considered is damage which will excuse the owner from performance of the contract of affreightment. The duty of the shipowner under the contract of affreightment is to convey the cargo to its destination by all reasonable means. Under the relevant exception in the contract he is excused from performing this duty if, and only if, he is prevented from performing it by a peril of the sea. The means by which he is to perform the duty of carrying the goods is the named vessel, subject to the right in certain circumstances to carry the goods by another vessel. If the ship is so injured by a peril of the sea that she is incapable of carrying the goods to their destination, and cannot by any amount of repair be made fit to do so, the owner will in general be discharged from his obligation under the contract. I say in general, because I can conceive of cases where this result would not follow.

For example, if the ship broke her back on a rock at the entrance to her port of discharge and could not be got off, so that she was incapable of carrying the cargo into port, but circumstances were such that the cargo could be unloaded into lighters and brought to port, it may well be that the owner would be bound under his contract so to bring them. Mr. Le Quesne, who appeared for the respondents, agreed that this would be so, and I may point out in passing that if this view is correct the case would be one where, although the vessel would be a total loss for the purposes of a policy on hull, there would be no loss of freight under a policy on freight, since the sea damage would not in fact have been sufficient to excuse performance of the contract of affreightment and so cause the owner to lose the freight.

In the next place, it appears to be clear that in the case where the only question is as to the damage to the ship, and no question arises as to the cost of repairs, the test (apart from exceptional cases such as that just mentioned) must be, is the damage such that the ship is incapable of carrying the goods to their destination? There may be cases where the vessel may remain or be made a seaworthy ship for the voyage, but cannot be made capable of carrying the particular cargo in question. The facts in *Doyle* v. *Dallas* (1) suggest a case where this might happen. There the vessel, which had been chartered to carry a cargo of hides from Buenos Ayres to England, suffered damage at Buenos Ayres which necessitated stripping her of her copper. Being a teak vessel she could be and was repaired sufficiently to enable her to proceed to England with some sorts of cargo, but in order to enable her to carry the hides it would have been necessary to re-copper her, which apparently could not be done at or near Buenos Ayres. The vessel was not lost, either actually or constructively, and it was so held in the action, where the claim was on a hull policy. But upon the facts the owners would have been entitled to be discharged from their liability under the charterparty and they could have recovered under a freight policy. Here again I point

(1) (1831) 1 Moo. & Rob. 48.

out in passing that in such a case there would be no constructive total loss of ship under a hull policy, but there would be a total loss of freight under a freight policy. The case is the converse of that referred to above.

I may summarize what I have said by saying that in my judgment, in cases where the only question is the possibility of effecting the necessary repairs and the question of the cost of repairs does not arise, (1.) the shipowner is not excused from performing his contract, unless he can show that owing to sea damage the ship cannot be considered a ship for the voyage and for the cargo in question, in the sense that she cannot be put into a condition to complete that voyage with that cargo; (2.) even when he can show this, he may yet not be excused if, upon the facts of the case, it is possible to get the goods to their destination by reasonable means, e.g., lighters, as in the example taken above. I do not include under this head transhipment and carriage by another bottom, as this is optional to the shipowner. (3.) If he can show that the ship cannot be considered a ship for that voyage with that cargo, he is entitled to be excused, even though the ship may be repaired so as to be a seaworthy ship fit to carry a different cargo for that or a different voyage.

If the propositions which I have ventured to formulate are correct, it follows that in considering the effect of the actual damage, quite apart from any question of the cost of repair, the test by which the position is to be judged is the test of the voyage. And this is, I think, the logical conclusion from the fact that the contract of affreightment is concerned, and concerned only, with the voyage in respect of which the rights and obligations of the parties under the contract arise.

So far I have been discussing the position which arises where repairs to the vessel are or are not possible, without there being any question as to the cost of the repairs; and the conclusion to which I have come is that the shipowner's duty under the contract of affreightment is, whenever it is practicable to do so, to effect such repairs as may be necessary to enable the vessel to carry her cargo to its destination, no more and no less. If the repairs necessary for this purpose are permanent and complete repairs, those are the repairs which must be carried out. If, on the other hand, temporary and incomplete repairs will be sufficient for the purpose, those are the only repairs which the contract obliges the shipowner to effect, since the completion of the voyage is the only matter with which the freighter is concerned.

But the duty to effect the necessary repairs to enable the vessel to carry the cargo to its destination is not an absolute duty. It is subject to this qualification (which for the moment I will state in quite general terms), that if the cost of the repairs is unreasonably large the shipowner is excused from executing them, and is entitled to treat his obligation to carry the goods to their destination as discharged by a peril of the sea. Another way of describing this result is to say that the shipowner is entitled to treat the vessel as lost in a commercial sense through a peril of the sea. If it were not for the fact that this description has the support of authority I should myself have been inclined to avoid the use of the word " lost," since it appears to me that it is a word which tends to confuse the issue. In particular, it tends to obscure the fact that, as between owner and freighter, the real question is, as it appears to me, not is the vessel " lost " in some absolute sense, but is she " lost for the voyage so far as regards the goods to be carried "; if she is not lost for the voyage so far as regards those goods, there can, I think, be no reason in principle why the shipowner should be excused.

The prima facie duty of the shipowner to the freighter being, as I have pointed out, to effect such repairs (whether permanent and complete or only temporary, as the case may be) as will enable the vessel to carry the cargo to its destination, the question whether on commercial grounds of expense he is to be excused from performing this duty ought, in my judgment, on principle to be determined by reference to the cost of the repairs which, on the facts of any individual case, are the repairs which prima facie he ought to do. The freighter is not entitled to call on the shipowner to effect repairs beyond what the contract demands in the circumstances of the case. He is, in the case supposed, claiming that the shipowner is bound to repair; the shipowner is seeking to excuse himself by saying that the cost of the repairs demanded by the freighter is so unreasonable as to justify the shipowner in refusing to execute them. On this basis it appears to me logically to follow, once the principle of the exception based on unreasonable cost is admitted, that the only repairs, the cost of which it is relevant to examine, are those repairs which, on the facts of the case, the freighter is prima facie entitled to require the shipowner to carry out. If, in order to carry the cargo to its destination, permanent and complete repairs are necessary, it is the cost of those repairs which must be considered. If, on the other hand, temporary repairs are sufficient for the purpose, the cost of those temporary repairs is the matter to be considered, and the cost of permanent and complete repairs is irrelevant.

I will illustrate my view by contrasting two cases. (1.) If temporary repairs will suffice to get the cargo to its destination and the cost of such repairs would be less than the value of the vessel, I do not see why on principle the shipowner should be excused from carrying out those repairs, merely because he can prove that the cost of permanent and complete repairs would exceed the value of the vessel as so repaired; in other words, the vessel in the case stated ought not to be treated as commercially "lost" for the purpose of the voyage, although on one view of the law relating to insurance on hull she may for the purposes of a hull policy be commercially "lost." As an example, I may take the case of a vessel which suffers a serious casualty close to her port of discharge. It may well be that the repairs necessary to enable her to complete the short remaining distance will be less than her value for breaking-up purposes, but that the cost of making her a really seaworthy ship would far exceed her repaired value. I can see no reason in principle why the shipowner should be able to say, in such a case, that he is not bound to effect the repairs necessary to get the ship with her cargo to her destination. (2.) If, on the

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other hand, the shipowner can prove that the cost of effecting temporary repairs sufficient to get the cargo home would exceed the repaired value of the vessel, I do not see on principle why the freighter should be able to call upon him to execute the repairs, merely because he can prove that when the vessel reached her port of destination and was permanently and completely repaired, her value would exceed the total cost of the repairs. What may happen to the vessel after her arrival at her port of destination and delivery of her cargo, what the cost of subsequently restoring her to her original condition may be, or her value when restored, are matters with which the freighter is not concerned, and I do not on principle see why they should be taken into consideration.

Before turning to a consideration of the authorities which bear upon the question under discussion, I will summarize the conclusions to which my examination of the principle has led me. (1.) In all cases where repair is possible, the prima facie duty of the shipowner under his contract of affreightment is to carry out such repairs to the ship (whether temporary or permanent and complete, as the case may be) as may be necessary to enable her to carry the cargo to its destination. (2.) This duty is not affected by the fact that as between the shipowner and his hull underwriter, if any, the case may, or would, be one of constructive total loss of ship, a fact which is not relevant to the consideration of the duties of the shipowner under the contract of affreightment. (3.) The shipowner is excused from the duty to carry out the appropriate repairs (whether temporary or permanent and complete, as the case may be) if he can prove that the cost of doing so would exceed the repaired value of the vessel. (4.) A consideration of the cost of repairs, which are not the appropriate repairs in the particular case, is irrelevant.

I now turn to a consideration of what are admittedly the three leading authorities on this branch of the law. The case of *Moss* v. *Smith* (1) was decided by the Court of Common Pleas in 1850. The action was brought by mortgagees of a vessel of 716 tons against underwriters on two policies of insurance. The first was a voyage policy on the ship valued at 12,000*l.*, at and from her port or ports of loading on the Pacific to her port or ports of discharge in the United Kingdom. The second was a policy for 1000*l.* on chartered freight valued at 4000*l.*, at and from Sydney, New South Wales, to Pacific ports to the port or ports of discharge in the United Kingdom. The charterparty was for a voyage from South America to the United Kingdom with cargo at a freight of 3*l.* 10*s.* a ton. After loading her cargo, the vessel began her voyage home, but suffered considerable sea damage and put back to Valparaiso. Surveys were made by surveyors " who estimated the repairs that would be necessary to proceed to England with her entire cargo," together with expenses of unloading and reloading, at 3710*l.* 5*s.*, " which would exceed the value of the freight but would be less than the value of the ship when repaired." On the advice of the surveyors the vessel was sold for 1734*l.*, and the cargo was delivered at Liverpool by other vessels at a freight of 4*l.* 15*s.* and 5*l.* per ton. The purchaser repaired the vessel at an expense of about 240*l.*, and sent her with a cargo to Hamburg, where she duly arrived. The plaintiffs claimed under each policy as for a total loss by perils of the sea, the allegation under the count upon the freight policy being that the ship was wholly lost, and that thereby the plaintiffs lost the freight.

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(1) 9 C. B. 94.

The direction given by Wilde C.J. to the jury as stated in the report was (1.) as to the count upon the hull policy that if the damage was such " that she was not susceptible of repair, so as to enable her to perform the voyage, save at an expense which would exceed her value when repaired " there would be a total loss of the ship; (2.) as to the count upon the freight policy if the vessel " might have been repaired within a reasonable time, so as to be enabled to bring home the whole of the cargo there had been no loss of any part of the freight: and that, if she might have been repaired so as to bring home a part of the cargo only, the plaintiffs would be entitled to recover for a partial loss on freight." Further light is thrown on the meaning and effect

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of the summing-up by various passages in the judgments. I may refer in particular to the words of Cresswell J. (1) and those of Wilde C.J. (who was the trial judge). (2)

The direction on the first count was not challenged by the appellant. As to the second count it was argued that Wilde C.J. had misdirected the jury because he "incorrectly applied to the freight the same test as to repairs which he had applied to the ship" and that the plaintiffs were entitled to recover by reason of the fact that the cost of the repairs necessary to enable the vessel to reach her port of discharge would have exceeded the freight payable under the charterparty. It is, I think, clear from the report that Wilde C.J. in his direction to the jury applied the same test as to repairs in the case of the freight policy as he had applied in the case of the hull policy. In his direction on the second count he uses the word "repaired" in the same sense as he had used it in the direction on the first count; and in the direction on the second count he introduces the matter of "reasonable time" and does not expressly refer to a total loss of ship or freight. The reason for this is, I think, that in his view if the jury had found a total loss of ship on the first count this would in the circumstances of the case have necessarily entitled the plaintiffs to judgment on the second count, whereas if the finding on the first count was for the defendants there could be no question of a total loss of freight, unless, at any rate, the repairs would have taken so unreasonable a time as to cause a frustration of the adventure.

The decision in the case affirmed the correctness of the direction to the jury and negatived the plaintiffs' contention that the freight was lost because the cost of repairs would have exceeded the amount of the freight. The question which arises in the present appeal did not arise in that case and was not directly discussed. It is to be observed that on the facts of that case the vessel was on any view clearly not a constructive total loss and as clearly she was not commercially lost for the purposes of the freight policy. It is, I think, true to say that on the evidence in that case

(1) 9 C. B. 106.
(2) Ibid. 107, 108, 109.

(in reference to which the summing-up—and I may add the judgments—are to be read—see per Maule J. (1)) the same facts negatived both constructive total loss of ship and total loss of freight. But I cannot read the decision as authority for the proposition that facts sufficient to negative a constructive total loss of ship are always necessarily sufficient to negative a total loss of freight; or the proposition that a total loss of freight cannot be established unless the facts are such as to establish a constructive total loss of ship. In the circumstances of the case both claims were negatived by the same state of facts, a thing which may well happen in many if not most cases which arise in practice. But however that may be, it is to be observed that no evidence was given as to the cost of permanent and complete repairs, the surveyors' estimate being an estimate of the repairs "necessary to enable the vessel to proceed to England with her entire cargo," namely, 850 tons of guano and a quantity of dollars and whalebone in contrast to repairs recommended by officers of one of Her Majesty's ships as being sufficient to enable the vessel to bring home about 500 tons of cargo. It may very well be the fact that the repairs necessary to bring a vessel of 716 tons from Valparaiso round Cape Horn to England in the year 1844 with her entire cargo would have been the same thing as permanent and complete repairs, but the report does not so state. In the direction to the jury the repairs referred to are such "as to enable her to perform the voyage." Maule J. says (2): "However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost." Cresswell J. says (3): "But, if a ship sustains so much sea-damage that she cannot be repaired, so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract," the contract being the contract of affreightment. The same learned judge proceeds: "The courts of law have also engrafted this qualification upon the contract—that, if the damage which results from a peril of the sea is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract." In this latter passage the repairs referred to clearly in my view are repairs of the same kind as those referred to in the earlier passage—namely, repairs which will render the vessel "competent to continue the adventure." Wilde C.J. (1) interprets the finding of the jury (arrived at after his own direction) as follows: "The jury found that the ship was not damaged to such an extent as to prevent her from earning the freight," and he says of his own direction (2): "The jury were told, that, if the cost of repairing the vessel so as to enable her to earn the freight, would exceed her value when repaired, in that case she must be considered to be damaged to an extent to prevent her from earning freight." These passages in my judgment show that the Court in that case clearly had in mind as the true test for the purposes of a contract of affreightment (and consequently for those of a policy on freight) that of repairs sufficient to enable the vessel to complete the voyage with her cargo.

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(1) 9 C. B. 101.

(2) Ibid. 103.

(3) Ibid. 106.

The next case is that of *Rankin* v. *Potter* (3), decided by the House of Lords in 1873. The policy was effected in respect of freight payable under a charterparty made while the vessel was on an outward voyage to New Zealand, under which a cargo was to be carried on the homeward voyage from Calcutta to England. The policy covered the vessel while on the outward voyage to New Zealand and in port there and the risk covered by the policy in effect was that the vessel would during the period covered by the policy be so injured by a peril of the sea as to prevent her arriving at Calcutta in a fit and proper condition to earn the freight. The vessel was damaged on arrival at Bluff Harbour in New Zealand, but eventually temporary repairs were effected which enabled her to reach Calcutta, where she was surveyed.

(1) 9 C. B. 107.

(2) 9 C. B. 108.

(3) L. R. 6 H. L. 83.

It is important to see what the evidence was as to the estimated cost of repairs. It is to be found in the report and is as follows (1): " The surveys and estimates showed that if the repairs really necessary to make the ship seaworthy, and enable it to bring home a cargo, were executed, they would exceed the value of the ship when repaired; and one paragraph of the case (paragraph 24) stated, ' It is admitted that the sea damage which the ship sustained at New Zealand, during the time covered by the policy was such as would have justified an abandonment and claim for a constructive total loss.' " I need not examine the opinions of the judges in any detail, but I may point out that Brett J. (2) and Blackburn J. (3) clearly to my mind treat the repairs necessary to enable the ship to complete the voyage as the true test. In the present case Porter J. thought that Blackburn J. in the passage just referred to had applied a wrong test for constructive total loss of ship. Whether or not he was right in so thinking is a question on which I do not propose to embark. But so far as regards the test in the case of a freight policy Blackburn J.'s opinion is quite clear and in my humble judgment quite correct. He says (3): " The question between the assured and the underwriter on the chartered freight is, whether the damage can be so far repaired that the ship can be at Calcutta, seaworthy for a voyage round the Cape of Good Hope, without expending on it more than it would be worth," thus taking the cost of repairs necessary to complete the voyage as the true test.

Lord Chelmsford in his speech, if I read it correctly, takes the same view as to the standard of repairs. He points out (4) that having regard to the special nature of the policy the question was " whether the ship had sustained such damage in New Zealand as to prevent her arriving at Calcutta in such a state of seaworthiness as would enable her to be tendered to the charterer in the terms of the charterparty as being ' tight staunch and strong and every way fitted for the voyage ' to England." The damage was in fact suffered

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(1) L. R. 6 H. L. 85.
(2) Ibid. 104.
(3) Ibid. 117.
(4) Ibid. 154.

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in New Zealand, the extent of the damage and the cost of the necessary repairs were not ascertained until the survey was made at Calcutta, where, as Lord Chelmsford says (1): "a survey disclosed the extensive nature of the injuries which she had sustained in New Zealand and the consequent impossibility of her performing the homeward voyage without such an amount of repairs as would have cost more than what her value would have been when repaired." Later he says (2): "A plain and clear view upon the facts and circumstances of the case can only be obtained by removing the policy on the ship out of the way, and looking at the case as if there were no other policy in existence but that on freight. Under this policy, it seems to me that the only question is whether, by the perils of the sea, the ship was so damaged at New Zealand, during the term of the policy, as to be rendered incapable, unless sufficiently repaired, of performing the voyage from Calcutta to England, for which she was chartered." Again he says (3): "If the sea damage which the ship sustained in New Zealand was such as to reduce her to a state which rendered her utterly incapable of performing the voyage to England without an expense which no prudent uninsured owner would incur, then the freight was totally lost from that moment, and how the owners chose to deal with the disabled ship afterwards was wholly immaterial. If the damage to the ship had been such that it might have been repaired at a reasonable expense and put into a condition to earn the freight, and the shipowners had declined to take this course, they would have lost the freight not by the perils of the sea but by their election. But the damage being such as to render the repair of the ship practically impossible, the question between the assured and the underwriters on freight must be regarded as if there were no policy on the ship; and then it becomes the simple consideration whether the freight was not totally lost by the perils of the sea, by what must be regarded, in relation to it, as the total destruction of the ship by which it was to be earned." I venture to call attention to the

(1) L. R. 6 H. L. 154. (2) Ibid. 155.
(3) Ibid. 159.

concluding words of this paragraph. The words "in relation to it" mean, I think, in relation to the freight, and if this construction be right Lord Chelmsford is saying that in a case between owner and freight underwriter the question is not the abstract question "must the ship be regarded as totally lost" but "must the ship be regarded as totally lost in relation to the freight," a distinction which I have already ventured to point out in words of my own.

Lord Hatherley says (1): "It is further admitted in the case that the injury was of such a character that no prudent owner would have repaired her for the benefit of the contract which had been entered into as to freight, because, in order to make those repairs, it would have been necessary to expend more than the whole value of the ship." It is true that he adds: "in other words, when it was ascertained what the extent of the injury was, it was found that she was in such a condition that, had the owners been minded to abandon her at the time when the injuries were sustained to those who had taken the policy on the ship (and who must be distinguished from those who had taken the policy on the freight which is now before us), they would have been justified in so doing"; and that he thus appears to treat the relevant state of facts for the purpose of the freight policy as being the same as the relevant state of facts for the purpose of the hull policy. There is also a passage in Lord Chelmsford's speech (2) which suggests that he took the same view. Both the noble and learned Lords are referring to the statement of facts on p. 85 of the report which I have already quoted. But whether or not these observations are to be treated as authority for the view that the relevant state of facts in such a case as that then before the House was the same for both purposes is to my mind immaterial. What is I think material is that each of them treated the fact that the cost of repairs necessary to complete the voyage would have exceeded the repaired value of the vessel as sufficient to produce a total loss of the freight.

The third case is that of *Assicurazioni Generali* v. *s.s. Bessie*

(1) L. R. 6 H. L. 164.

(2) Ibid. 155.

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Morris Co. (1), commonly referred to as the *Bessie Morris* case. That was a case between shipowner and charterers. The vessel was found to have been capable of being repaired so as to carry what was left of her cargo to London, her port of destination; she was in fact repaired temporarily at Gibraltar, her port of refuge, and carried a cargo from Oran to Garston. No question as to commercial loss of the vessel arose, nor indeed could it have arisen in view of the circumstance that she was in fact repaired; but it appears from the judgment of Lord Esher M.R. (2) that the repairs (which, as already stated, were temporary repairs) were executed at a cost "very far less than the value of the ship," and he adds: "and that being so, no reasonable shipowner, having regard to his own interests, would have failed to do the repairs." In the passage immediately preceding, the Master of the Rolls states the law as follows: "If she had been got off as a mere wreck, as explained by Maule J. in *Moss* v. *Smith* (3), and could not have been repaired, either where she was or at any other place, so as to be able to complete the voyage within any time which could be considered a fulfilment of the contract, she would have been prevented by the perils of the sea from fulfilling that contract, though she might have been able to perform some other voyage. But, in fact, the ship was got off, and she was taken to Gibraltar, where she could be repaired. What is the duty of the shipowner in such a case? His duty is to repair the ship, if it is possible for him to do so. That the ship in the present case could, in fact, be repaired cannot be denied. But, as Maule J. said, in the case to which I have referred, the possibility must be a business possibility. If it is possible in a business sense of the word to repair the ship, the shipowner is bound to repair her. If the cost of the repairs necessary to enable her to complete the voyage contracted for would be more than the benefit which the owner would derive from them, then it would be impossible in a business sense to repair her. In the present case the ship was repaired at

(1) [1892] 1 Q. B. 571; [1892] 2 Q. B. 652.

(2) [1892] 2 Q. B. 658.

(3) 9 C. B. 102, 103.

Gibraltar, and the cost consisted of the expenses of the salvage of the ship and of the repairs necessary to bring her to London. We know that she was repaired sufficiently to enable her to reach Liverpool by a voyage longer than that provided for by the charterparty, at a cost of 750*l.* in addition to the expenses of salvage."

Bowen L.J. also applies the test of the voyage. He says (1): "The shipowners' contract was that they would fulfil the specified voyage, unless they should be prevented by the perils of the sea. Their only excuse for the non-performance of the voyage would be, that its performance was prevented by the perils of the sea. The ship went aground; but, in order to show that she was prevented from performing the voyage agreed upon by the perils of the sea, she must have become unnavigable for that voyage, either on the ground that it was impossible to get her afloat again, or that, on account of the extraordinary expenditure necessary for that purpose, it would be unreasonable to require the shipowners to incur it. In the present case, so far from the ship being unnavigable, or having been treated as such, she was repaired, and was put into a condition fit for the performance of her voyage." In this passage I read the words "for that purpose" as referring to the completion of the voyage. Again he says (2): "In the present case, the answer to the contention of the shipowners is, that the ship never was unnavigable, that she never was incapable of performing her voyage."

I read these repeated references to the repairs necessary to enable the vessel to complete the voyage at their face value. I see no reason to disregard them or to attempt to explain them away. In my opinion, they confirm the view which on principle appears to me to be the right one as explained in the earlier part of this judgment.

I do not propose to burden this judgment, which is I fear already too long, with an examination of other authorities. In so far as there may be in other cases indications of a view different from that which (if I have rightly construed them) is to be found in the three authorities which I have discussed

(1) [1892] 2 Q. B. 659.

(2) Ibid. 661.

I am content to follow the latter. Nor do I propose to embark on a discussion as to the standard of repairs which ought to be taken into account for the purpose of constructive total loss as between owner and hull underwriter. Any such discussion would, in my judgment, be irrelevant as well as confusing. But before leaving this branch of the case I wish to say that although the decision in the *Carras* case (1) did not cover the point raised in this appeal, I find nothing in the judgments which is in any way inconsistent with the view which I have expressed. The point was in terms left open by Slesser L.J. and myself, while the reasoning of the Master of the Rolls, in my respectful opinion, lends support to the conclusion which I have formed. I should perhaps add that one sentence in my own judgment in that case as reported appears to suggest that I had formed the view that in the case of constructive total loss under a voyage policy on hull, the appropriate repairs to be considered are not such repairs as would be necessary to make the vessel navigable for the voyage in question. I refer to the first new paragraph on p. 315 of the report. I would have expressed my meaning better if I had said that on one view of the law this would be so, since, as appears elsewhere in the judgment, I had no intention of expressing any considered view upon the question what standard of repairs was appropriate to consider in such a case.

The only other matter to which I wish to refer is the question whether the shipowner is to be debited with some and, if so, what amount in respect of freight. On the figures the position is as follows. The cost of repairs (in the sense in which I have used that expression) was 19,161*l.* The estimated repaired value of the ship, on the basis of January values, was 6250*l.* and on the basis of May values, 6500*l.* The estimated general average contribution by cargo was, on the basis of January values, 4698*l.* and, on the basis of May values, 7201*l.* If the value of the vessel and the contribution by cargo be deducted from the cost of repairs, the result is January values 8213*l.*, May values 5460*l.* The total gross freight was 8000*l.*, of which 548*l.* had been paid in advance, leaving 7452*l.* at risk. The cost of earning this 7452*l.* was estimated at 2174*l.*, leaving 5278*l.* as the net freight remaining to be earned. It will be seen therefore that if the shipowners were debited with the whole of the gross freight, namely, 8000*l.*, on the basis of the January values they would have incurred a loss of 213*l.* whereas, on the basis of the May values, they would have benefited by repairing the vessel and completing the voyage to the extent of 2540*l.* As in my opinion the right values to take on the facts of this case are the January values, the question whether the shipowner ought to be debited with some and, if so, what amount in respect of freight does not arise, and I do not express any opinion upon it.

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(1) [1936] 1 K. B. 291.

SCOTT L.J. This case raises for decision certain questions of principle left open by Parliament when it passed the Marine Insurance Act, 1906. It is said on what seems to be good authority that the distinguished lawyers who settled the drafting of that Bill were unable to agree upon the law as to insurance of freight, and that that is why the Act says so little about it. Be that as it may, we have enjoyed the privilege of a full review of all the decisions closely or remotely bearing upon loss of freight and of listening to very careful and illuminating arguments from all four counsel. But in the end the result seems to depend on rather simple principles and conclusions affecting first the interpretation of the policy and secondly its application to the agreed facts.

The precise point for decision is not in my view concluded by any of the decided cases, although there are many passages in the judgments in which the path of judicial reasoning has come near to it, and some in which the language used seems actually to cover it. But in no case was the mind of the Court directed to the present point as the issue for adjudication and there does not seem to me sufficient certainty or unanimity of opinion to warrant a decision as upon authority without explicit reliance upon first principles. I therefore propose to approach the problem upon what I conceive to be the

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principles applicable. In the analysis of marine insurance cases it is often difficult to keep interpretation and application wholly separate and the present is no exception; but so far as practicable it is helpful to clear thinking to endeavour to do so. It is also important not to forget that most of the law of marine insurance is in essence pure interpretation of the contract contained in the common form of marine policy. We have all got into the mental habit of thinking of it as substantive law, particularly since its codification in statutory shape; but the Act has made no difference in the essence of the legal problem—as is made plain by ss. 1, 30, 87, 91, sub-s. 2, and the " Rules for Construction of Policy " contained in the Schedule. It is, as it always was, primarily a problem of interpretation; the Act merely fixes the interpretation which it requires the Court to put on the old form of policy unless the special terms of the particular contract vary it. I emphasize the point, because on a difficult question such as that in debate in the present case it seems to me helpful to keep the interpretation aspect prominently in mind and to remember that we are trying to determine what was the intention of the parties in respect of loss of freight as disclosed by their written contract, and especially in respect of the events and conditions in which the right to payment for a loss of freight should become operative. The force of the above consideration is accentuated where the claim is for a total loss of freight, as the Act does not vouchsafe the specific aids to interpretation in the case of freight that it does in the case of ship and cargo; see especially s. 60 on constructive total loss. In this appeal we are only concerned with total loss, actual or constructive, as we are not asked by the appellants to deal with any claim for a partial loss.

The first question in this appeal is one of pure interpretation: " what does the contract provide as to the events in which the insurer undertakes to pay the insured sum? " The archaic words of our ancient form of marine policy, set out in the Schedule to the Act, and embodied in the policy sued on, afford little guidance in the way of description or explanation as to the circumstances which the insurer agrees shall constitute a loss for which he has to pay. Indeed the statutory form is inapt to cover freight at all, although it is habitually used by Lloyd's for insurance of freight by adding written or typed words to the printed form, regardless of grammar, so as to bring in that subject-matter. The policy in the present case is not wholly in the statutory form ; it is entitled as a "cargo and freight" policy, and it excludes the usual words of hull insurance ; but it is very nearly in common form, and certainly contains nothing to indicate a different construction to that of the statutory form with the words "on chartered freight and/or freight" added in ink or type in such a place as to show that that was to be the subject-matter of the insurance. There is, however, at this stage of English legal history, no room for doubt that the primary bargain intended by the policy before us is simply this : "We the insurers agree that if the assured suffers a total loss of his chartered freight by perils of the sea, we will pay him the whole sum insured" ; and if that be a correct paraphrase of the policy language, it is plain that our decision as to whether such a loss has happened in the present case or not will depend chiefly on the correct interpretation of the words "loss of his chartered freight." The second question in the appeal—whether, assuming a loss of the chartered freight, that loss was by perils of the sea, is also in part one of interpretation. In truth, apart from authority, this appeal depends almost entirely on ascertaining the true purport of the contractual bargain ; once that is put into plain English, the broad lines of the application of it to the facts, I think, become clear enough. But the questions of interpretation are not easy, and the surrounding circumstances have to be looked at. There is no doubt on the evidence that the insurance was effected by the assured in order to cover their lump-sum freight of 8000*l.* payable to them under the charterparty of the s.s. *Mount Taygetus* dated November 2, 1933 ; or that the contract cargo was loaded ; or that the vessel sailed on the contract voyage. Accordingly the words "chartered freight" in the clause typed into the chief of the attached slips under the head of "Interest insured," must mean the

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assured's right to earn and receive that particular freight under and in accordance with the terms of that charterparty. We do not know the date of the slip but there is no doubt that the policy of November 22, 1933, attached to that marine adventure and no other; and no question as to whether any bill of lading freight or any mere expectation of freight is covered by the policy arises for our consideration. In the result the words "and/or freight" which follow the words "chartered freight" never became operative, and on the facts before us may be treated as irrelevant surplusage. Thus the sole subject-matter of the insurance was the prospective right to receive payment of the 8000*l.* on due delivery under the charterparty at the contract destination of the contract cargo, or such substantial part of it as should survive the excepted perils of the voyage; and the contingency against the happening of which the insurance gave protection was the risk of the assured, as shipowner under the charterparty, being prevented by perils of the sea from earning that freight by the carriage to destination of the cargo or such part of it as would entitle him to the 8000*l.* freight in the ship named in the charterparty. The policy does not say in terms that it is the earning of the freight by the named ship, the *Mount Taygetus*, which is insured, but the whole insurance is expressed to be in respect of the *Mount Taygetus*, and that ship and no other was the subject of the charterparty to which the policy, for the purpose of defining the subject of the insurance contract, implicitly refers where it describes the interest insured as "chartered freight." It is necessary to bear these considerations in mind, as they dispose of an argument addressed to us, with which I will deal in a moment, on the general right of a shipowner under a contract of affreightment to tranship cargo into another vessel, carry it to contract destination in the substituted vessel, and then exact payment of the contract freight on the cargo so delivered. In origin this right of transhipment was probably grafted on to the contract of affreightment by the law merchant as an incident already attached by commercial usage: see per Martin B.

in *Hickie* v. *Rodocanachi*. (1) It was not made the subject of express stipulation in the common forms of either charterparty or bill of lading so far as I know, but it has for long been treated as an implied term of every contract of affreightment (unless of course the express terms of the contract should happen to be inconsistent with it). It has, however, always been regarded by our Courts as a liberty allowed to the shipowner and not as an obligation imposed on him. The rule is sufficiently stated in Scrutton on Charterparties (13th ed.), pp. 314–6, art. 103, and the cases there cited: also see *Hansen* v. *Dunn* (2), per Kennedy J.

It was urged by counsel for the respondents that if a shipowner can tranship and so earn his freight under his contract of affreightment, he is precluded as against his insurers from alleging a loss of freight under his contract of affreightment, even although the particular ship named in both contracts as the carrying vessel may have been prevented by a peril insured against from completing the voyage. On the facts of the present case we understood counsel on both sides to agree that another vessel could not have been procured for less than 7000*l*., but in spite of that and certain substantial further expense involved in transhipping the remaining sound cargo, it was contended by counsel for the respondents that the appellants could in the present case have transhipped and were therefore precluded in law from alleging a loss of the chartered freight by perils of the sea. The respondents' general argument as to the proper interpretation of any policy of freight insurance in common form was also founded partly on the implied right of the shipowner under his contract of affreightment to tranship, it being urged that in every case the onus rested on the assured to prove not only that completion of the voyage in the contract vessel was physically or commercially impossible, but that transhipment was in the existing circumstances impossible. For both reasons it is necessary to deal with this contention. The answer to it is, I think, plain. In the first place, even apart from the insurance position, transhipment is under the contract of

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(1) (1859) 28 L. J. (Ex.) 273, 274.

(2) (1906) 11 Com. Cas. 102, 103.

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affreightment, as I have already said, a privilege or liberty of the shipowner, and not a duty. In the second place, whatever the position may be under the contract of affreightment by itself, the insurance policy on chartered freight is concerned only with the named ship ; the insurance is against inability to carry to destination in that ship. This is a basic term of the insurance contract, and I think it limits the ambit of discussion upon loss of charterparty freight to performance by the ship named in the policy ; in other words, it is an implied term of the insurance contract that the assured's right of transhipment under his contract of affreightment is to be ignored by both parties. At any rate, that is the meaning, in my view, of the policy before us.

Except in clauses 4 and 5 of the attached " Institute Voyage Clauses—Freight " the policy does not incorporate or depend on, or refer to any other contract of insurance, whether on hull or on any other subject-matter of insurance, whether effected by the shipowner or by any one else, for example, the cargo owner. And for the purpose of this judgment it is unnecessary to discuss the effect of those two clauses, as the Court of Appeal has recently considered them in *Carras* v. *London & Scottish Assurance Corporation* (1) and decided that they are irrelevant to such questions as we have to determine in the present case. The judgments of the Court in that case are, of course, binding on us in the present case, but the reasoning on which they are based covered so much of the ground which we have to traverse here that I desire to add for myself that I not only recognize the binding effect of the actual points of decision there reached, but agree with the reasoning and the opinions incidentally expressed in the judgments of that case, and therefore repeat no part of them ; they throw much light on the legal questions involved in or germane to this case. The results of the application of the *Carras* (1) principles here are that no other policy has for present purposes any relevance, that no question of constructive total loss of ship in the proper insurance sense of that expression is germane to the present discussion, that

(1) [1936] 1 K. B. 291.

this policy must be construed and applied on the footing that the plaintiffs were otherwise wholly uninsured ; and that the ordinary test of the prudent uninsured owner is applicable within its proper limits.

The plain meaning of the policy being that a loss of the chartered freight will take place and the insurer's obligation to pay the insured amount will arise, if the assured is prevented by perils of the sea from earning the freight due under the charterparty, the test of loss under the policy is relegated to the charterparty contract, save that, as I have already pointed out, the policy makes it impossible for the insurer to rely upon the assured's common law liberty under his charterparty of transhipping ; the insurer cannot oppose that defence to a claim of prevention by sea damage caused to the named ship.

In considering a total loss of a lump-sum freight it is necessary to bear in mind that where the charterparty provides for a lump-sum freight, a failure of the shipowner to deliver a part of the cargo does not of itself deprive him of his right to be paid the whole of the lump sum, at any rate assuming a substantial part of the cargo to be delivered, and the cause of partial failure to have been an excepted peril : see art. 140 of Scrutton on Charterparties. The insurance against loss of chartered freight in this case therefore meant that the assured, as owners of the *Mount Taygetus*, were covering themselves against the risk of their being prevented by perils of the sea from carrying any appreciable part of the cargo to destination in that named ship.

The ultimate question for our decision being whether the assured did suffer a loss of their freight by perils of the sea, the test imposed by it is conveniently expressed in terms which closely reflect the particular circumstances out of which the controversy has arisen. Substituting the objective for the subjective—" prevention caused " for " loss suffered "— the issue may without change of meaning be stated quite simply : " Were the assured prevented by the strandings and other events described in the agreed statement of facts from carrying the remaining sound cargo to Europe in the *Mount Taygetus* ? and were those events the proximate cause of prevention ? " The test of " prevention " as of " loss " is, of course, commercial as well as physical, as was judicially explained in *The Bessie Morris* (1), applying the principles in *Moss* v. *Smith* (2) and *Rankin* v. *Porter.* (3) That is not because prevention under a contract of charterparty is for all purposes or always the same thing as a loss under a contract of insurance, but because all commercial contracts must be interpreted in the light of commercial common sense, if effect is to be given to the commercial intentions of the parties : and when a business man thinks or speaks of " prevention " or " loss " in such a context, he has in mind commercial as well as physical causes and criteria. We may therefore read this policy as saying : " If you, the assured, are prevented in a commercial sense by perils of the sea from carrying in the *Mount Taygetus* to Europe enough of the contract cargo to earn the chartered freight we agree to pay a total loss." I state the bargain thus without reference to physical loss as, on the facts of the present case, the assured cannot say that they were prevented by physical causes, for more than half of the cargo was in fact carried to destination in the *Mount Taygetus* after temporary repairs, although at the instance of and by the salvors, and not by the assured.

The main difficulty in arriving at the correct interpretation of " commercial prevention " in the question so framed arises from the legal necessity of observing the principle of the law of contract, that the prospect of a contract proving financially unprofitable, however certain the prospect may be, is not of itself prevention and is no ground for release from the obligations of the contract. A shipowner may have made an unwise bargain, or the contract may have proved more expensive in performance than he had anticipated ; but neither fact entitles him to claim that he is in a commercial sense prevented from carrying out his promise. The law says simply that if he has made what proves to be a bad bargain that is his misfortune but that it does not afford him any excuse for non-performance ; and that is because

(1) [1892] 2 Q. B. 652.
(2) 9 C. B. 94.
(3) L. R. 6 H. L. 83.

such a release would not be in accordance with the contract, correctly interpreted: see per Lord Loreburn in *Tennants (Lancashire)* v. *Wilson & Co.* (1) The contractual duty of the shipowner to the cargo owner to repair the ship when damaged, at his own cost and regardless of the profit and loss account of the voyage, as stated by Kennedy J. in *Hansen* v. *Dunn* (2), is a mere illustration of the general principle. This principle in my view rules out the contention that the cost of temporary repairs by itself constitutes any test. The rule expressed in cases like *The Bessie Morris* (3) that in commercial contracts commercial prevention is equivalent to physical prevention has therefore to be harmonized with this rule of holding a man to his contract though it be financially to his own let or hindrance. Both rules are fundamental and the solution must transgress neither. The way of escape from the antinomy in my view lies in a third principle of the law of contract—that a contract may be intended by both parties to be dependent for their mutual benefit upon some basic condition, such as the continued existence or availability of a particular thing, or state of affairs, so that if the condition fails the contract is discharged, or at any rate becomes unenforceable: *Taylor* v. *Caldwell* (4), or *Jackson* v. *Union Marine Insurance Co.* (5), or *Bank Line* v. *Capel* (6); and see also *Comptoir Commercial Anversois* v. *Power* (7); Scrutton on Charterparties (13th ed.), pp. 110 et seq., and the cases there cited. The basic condition under the charterparty here (at any rate with the shipowner's common law liberty of transhipment excluded from it by the policy restriction of the venture to performance by the *Mount Taygetus* alone) was the continued existence and availability of the *Mount Taygetus* throughout the voyage. If the *Mount Taygetus* should be at any time during the contract voyage rendered by sea perils incapable of completing the voyage within a reasonable time so as to earn the freight, then whether the incapability was physical or

(1) [1917] A. C. 495, 510.
(2) 11 Com. Cas. 100.
(3) [1892] 2 Q. B. 652.
(4) (1863) 3 B. & S. 826.
(5) L. R. 10 C. P. 125.
(6) [1919] A. C. 435.
(7) [1920] 1 K. B. 868, 886, 887.

commercial the basic condition of the contract would be broken, and the charterparty contract ipso facto discharged, as Lord Sumner said in *Bank Line* v. *Capel* (1), or at any rate each party would have the option of treating the contract as at an end. On that footing it is clear that if the ship as a merchant ship employed in a shipowner's business should be so damaged that as one of his fleet and an asset of his business it would not be worth his while to incur the cost of repair, the ship would be commercially lost and the basic condition would be broken; the charterer's right to insist on carriage of the cargo to destination, and the owner's to insist on payment of freight, would both lapse. The view that one of the ways, perhaps the main way, in which an actual loss of freight may happen under a freight policy is through the ship ceasing to exist or be available for the earning of the freight seems to be almost indicated by the language of s. 3, sub-s. 2 (*b*), of the Act: it is at least in harmony with it. On that footing delivery in the *Mount Taygetus* at the destination defined by the charterparty of enough cargo to earn the lump-sum freight having been prevented by perils of the sea, there would be an actual total loss of freight under the policy.

The first question logically in the appeal is, therefore, whether the facts in evidence are sufficient to establish a commercial loss of the *Mount Taygetus* judged by the charterparty criterion. It was urged by the respondents that no evidence was led by the assured as to either the vessel's repaired value or the cost of permanent repairs; and that such evidence was essential to prove a commercial loss of ship, whether as a constructive total loss under a hull policy or as a commercial loss of the carrying vessel under a contract of affreightment. But the issue is a jury question, and in my view precise figures on that comparison are only required if the two figures are likely to be near each other; and in this case I cannot see that they were. The fact that the salvors when they got the *Mount Taygetus* to Europe realized the cargo and sold the ship to be broken-up raises a presumption that they thought

(1) [1919] A. C. 454.

they had no better market for her and that to repair her would not pay. The terrible slump in shipping values which still prevailed at the time is common knowledge. I, therefore, draw the inference of fact that the cost of permanent repairs, added to the net cost of temporary repairs and other costs to be incurred in getting the vessel to the port of repairs as shown on pp. 54–6 (but including the ship's part of the liability for full salvage claims, that is, the arbitration claim of 14,500*l.* as well as the 11,000*l.* with contributory values assessed as in January, 1934), would certainly have exceeded the market value of the ship when repaired. But there are two further aspects. The first is the salvors' lien, reducing the value of the ship to the owner by the figure at which that lien would ultimately be assessed after arbitration. The second is the value of the wreck, which, in considering the comparison in terms of business prudence, has also to be brought in. If so the conclusion of fact seems to me to be lifted altogether out of the region of doubt. But even if we assume the possibility of a doubt remaining as to whether on the facts subsequently known the assured have quite discharged the onus of proving a commercial loss of their ship, it is important to bear in mind the legal principle that in a commercial adventure men must know where they are, and be free to take and act on immediate decisions in the light of the facts as known to them at the time, assuming reasonable assurance that they have taken all possible steps to obtain the necessary information: see per Scrutton J. in *Embiricos* v. *Reid & Co.* (1), a case where he was dealing with restraint of princes in regard to a charterparty in which he cited the views of Lush J. in *Geipel* v. *Smith* (2) and of Lord Gorell in *The Savona* (3) and said: "Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities when they are called upon to make up their minds." Lord Tenterden C.J. directed the jury in *Doyle* v. *Dallas* (4), a

(1) [1914] 3 K. B. 45, 54.
(2) (1872) L. R. 7 Q. B. 404, 414.
(3) [1900] P. 252, 259.
(4) 1 Moo. & Rob. 48, 54.

claim for constructive total loss on a hull policy, in the following terms: "The only question is, whether this amounts to a total loss? The ship is not bodily and specifically lost; but circumstances may have occurred which, according to the law established in cases of marine insurance, are equivalent to a total loss. I think the circumstances in this case will have that effect, if at the time of the sale, that measure, on the sound exercise of the best judgment, appeared most beneficial to all parties. It is not enough that the owner acted honestly in the sale, and intended to do for the best; the underwriters are not liable unless he formed a correct judgment, that is to say, the best and soundest judgment which could be formed under the circumstances which then existed. Nothing less than this, in my opinion, will make a total loss, while the ship continues in existence." Although the jury in that case found against the plaintiff the acceptance by Lord Tenterden of the right of the assured to treat the vessel as totally lost, if he honestly came to that conclusion on the information which then existed, embodies the same principle as that expressed by the late Scrutton L.J. On this principle I think the assured here were in fact entitled to treat the *Mount Taygetus* as lost both on December 28, 1933, when they gave their notice of abandonment in London, and on February 5, 1934, when everybody concerned, other than the underwriters on freight, decided that the adventure must be abandoned, and the ship relinquished to the salvors. The dominant facts in the mind of the assured on those dates must have been first the salvage position, a lien on ship and cargo for 11,000*l.* certain, and a further claim which on January 27 they had put at 14,500*l.*, on the terms of the agreement dated December 27, 1933, and, secondly, the very grave degree of damage involving, as the master cabled, an impossibility of restoration to seaworthiness. In the course of the argument there was much discussion as to whether the voyage rather than the ship was the basic conception to which a loss under a freight policy must be related. It was also said by counsel for the respondents that even if the loss of the carrying ship was (as I think) the dominant condition of the assured's right to recover, in considering whether there was such a loss of ship under the charterparty the amount of freight receivable should be deducted from the cost of repair side of the comparison before the commercial result could be seen. On this question many passages from judgments were cited to us pro and contra, including the much discussed second sentence in the advice of Blackburn J. to the House of Lords in *Rankin* v. *Potter*. (1) If I am right in what I have already said in favour of the appellants it is not necessary in the present appeal to determine that question of law; but I feel bound to say that it seems to me very difficult to bring in the value of the freight receivable at destination on the assets side of the account without treating the pecuniary outcome of the voyage as the criterion of loss of freight; and that, in my view, is to transgress the principle that a man cannot get out of his contract merely by showing that its result will be financially unfavourable to himself. I recognize that there are many phrases in the old cases—and some in later cases—about loss of the voyage, or of the venture, or fitness of the ship "to complete the voyage," or equivalent words, and many references to freight; but I do not think the trend of actual decisions or even of judicial opinion has been to treat the profitable or unprofitable probabilities of the voyage after a casualty as a test for loss of freight under the policy.

On the other hand it may well be that even excluding the operation upon the contract venture of mere delay (which is made an inadmissible consideration in the present policy by clause 7 of the Institute clauses), the principle of *Jackson* v. *Union Marine Insurance Co.* (2) and the frustration decisions of the House of Lords during and after the war has a proper application in a case where it can be shown that although the ship is not "lost" the whole basis of the adventure has been destroyed by a peril insured against; and it may in special circumstances be possible to establish such a case without at the same time transgressing the principle that a contract does not cease to be binding merely because it is, or has

(1) L. R. 6 H. L. 117.

(2) L. R. 10 C. P. 125.

become, unprofitable. Indeed, in the present case the information conveyed by cables to the assured in London certainly seemed to invite the inference that the whole adventure had been destroyed; and apart from Institute Clause No. 7 I might have been prepared to apply that inference here. As it is, I express no opinion—even as to the effect of that clause—preferring to rest my judgment on the actual commercial loss of the ship within the meaning of the charterparty, or, alternatively, on the ground that in the circumstances known to the assured at the time their decision to treat it as an actual loss was justified under the charterparty contract and under the policy.

The preceding part of this judgment (except the second paragraph on the first page) was written by me without having read the judgments of my learned brethren; but I have now read them and realize that although we all reach the conclusion that the assured are entitled to our judgment, my brethren reach it by a different route to mine. Both their judgments express the view that the present position is covered by authority, not, it is true, by actual decision of the precise point, but by such deliberate expressions of opinion and of reasoning in pari materia, that we ought to follow the line of thought so indicated. Had I taken this view of the judicial passages on which they chiefly rely, I should have felt bound to follow their lead, but I do not. In particular, I am not satisfied that the distinction was in those cases being consciously drawn by the various judges whose words they cite between the two wholly distinct legal positions which I have endeavoured to state—namely, (*a*) no release of the shipowner from the obligation of his contract through his freight contract having by the operation of excepted perils become unprofitable—even ruinously so—and (*b*) the failure of a basic condition of his obligation, such as occurs when by the like perils either the carrying ship is lost, physically or commercially, and so rendered unavailable for performance of the contract of affreightment according to its terms, express or implied, or the whole adventure is frustrated. (*a*) leaves the shipowner still bound by his duty to deliver the cargo at destination;

he cannot say that he is " prevented " by the perils from carrying out his contract or that he has thereby " lost his freight " ; he has simply to repair his ship at his own cost and stomach his pecuniary loss as best he may. (*b*) on the other hand, releases him from his contract and entitles him to say : " I have lost the power of carrying out my contract by reason of the contract ship being no longer available, or the frustration of the adventure ; impossibility of performance has supervened by the failure of a basic condition of the contract ; the contract is at an end or at any rate I am released from my contract obligation in accordance with, and not in breach of, my contract, free to act upon the actual business position in accordance with my business interest and to say to my insurer I have, in the commercial sense of my policy, lost my freight."

In particular in descriptive expressions to be found in the decided cases about the condition of the sea-damaged ship, I do not think that " fitness to complete the voyage " is always intended to mean a condition of less effective repair than that required to restore the ship to a condition of permanent fitness broadly similar to its pre-casualty state.

I agree with both my brethren that the informal statement of salvage and general average expenses jointly prepared by the distinguished average adjusters on the two sides may be treated as a statement of the cost of repairs, and expenses incidental to repair, from Magallanes to the point of delivery of cargo at contract destination ; and that in the estimate of commercial loss of ship it is all relevant. I also agree with their conclusion that the prudent owner, party to the charterparty, would on those figures certainly have decided not to prosecute the adventure further if he was free to choose. But I do not accept the position that those figures standing alone satisfy the insurance test of loss of freight, or loss of either ship or adventure as working a loss of freight in the insurance sense. So to treat them seems to me to be equivalent to taking a profit and loss account of the voyage, and to concluding that there is a loss of freight under the policy, because the charterparty voyage had proved unprofitable.

I cannot see any way out of that legal difficulty unless there has been either loss of ship absolutely and not merely relatively to the voyage, or loss of the adventure by frustration. In the present case, as I have already said, I am satisfied that the ship was lost, basing my conclusion upon the inference which, although the issue, as I see it, was not fully discussed in the Court below I think we are entitled as a Court of Appeal, in the circumstances of the present case, to draw from the facts which are beyond dispute. Had I felt any doubt upon the right inference to be drawn, I should have proposed that the case should be sent back for further consideration; but no further evidence is, so far as I can see, available which could alter the position of fact already made clear. This being so, I think it is our duty to draw our own inference and not to send the case back.

In the middle of his judgment Greene L.J. states as his conclusions of law four propositions. With the first two I agree wholly and without qualification; constructive total loss of ship is in no way the criterion of a commercial loss of the chartered ship within the meaning of the charterparty. But in his third and fourth propositions he expresses the view that in a case like the present where the repairs necessary to carry the contract cargo to destination fall far short of the repairs necessary to restore the ship to substantially what she was before the casualty, able to keep her class and to be an effective unit in the shipowner's commercial fleet, the cost of the "temporary" repairs brought into an account such as that appearing on pp. 54, 56 of our document will turn the balance and produce a loss of the voyage and therefore of the freight within the charterparty contract or at least within the freight insurance contract. From that view I feel bound, with diffidence but definitely, to dissent for the reasons which I trust I have made clear in the earlier part of my judgment.

I have read with care all the cases cited to us, and a good many more, and a good deal of the text-books on and round the subject; but I do not think it necessary or useful to discuss them in detail.

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I agree that the appeal should be allowed.

Appeal allowed.

June 30. The appellants now made an application for interest on the amount recovered on the policy.

Willink K.C. and *Cyril Miller* for the appellants. As the appellants have been kept out of their money, and the respondents have had the benefit of it for so long a time, the appellants are entitled to interest on the amount from the date of the loss—December 23, 1933, and the rate should be 4 per cent.

Le Quesne K.C. and *W. L. McNair* for the respondents. It has not been the practice of the Commercial Court to allow interest where, as in the present case, it was reasonable for the underwriters to test the claim of the assured. It should be borne in mind, too, that the point on which the appellants succeeded was only on an amendment made when the case was before this Court. In any event, if interest is allowed, it should be at the commercial rate and not at 4 per cent., and only from six months after the date of the loss.

The Court (SLESSER, GREENE and SCOTT L.JJ.) said that interest would be allowed at 4 per cent. as from March 1, 1934.

Application allowed.

Solicitors for appellants: *Ince, Roscoe, Wilson & Glover.*
Solicitors for respondents: *Waltons & Co.*

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April 30;
May 1, 5,
11, 12, 13,
14, 15, 16;
July 13.

GREIN *v.* IMPERIAL AIRWAYS, LIMITED.

[1934. G. 974.]

Carrier—Carriage by air—Return ticket—Death of passenger—Claim for damages—" International carriage "—Carriage by Air Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 36), *Sch. I., arts.* 1, 2, 17, 22.

G. took a ticket from London to Antwerp and back, with an agreed stopping place at Brussels, by the defendants' air service. The ticket, which was available for fifteen days, was issued in three parts, one which G. was to give up at the place of departure, another at the place of destination, and the third he was to keep; and it stated the fare as 4*l.* for the outward journey, and 2*l.* 8*s.* for the journey from Antwerp to London. If G. did not return within the fifteen days he would be entitled to a refund of the 2*l.* 8*s.*

Great Britain is, and Belgium is not, a High Contracting Party to the Convention of Warsaw which is scheduled to the Carriage by Air Act, 1932, and which applies to " all international carriage . . . . by aircraft for reward," and which defines " international carriage " as " any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage . . . ., are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty . . . . of another Power, even though that Power is not a party to this Convention." The Convention further provides that " in the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs."

On the journey back from Antwerp to London the aeroplane in which G. was travelling was wrecked in Belgium, and G. was killed. In an action by his widow claiming damages in respect of his death, Lewis J. found that the accident was due to the negligent management of the aeroplane; that the tickets issued to G. involved two distinct carriages, one from London to Antwerp and another from Antwerp to London; that the latter carriage, during which G. met his death, being a carriage from a place not within the territory of a High Contracting Party was not " international carriage " within the meaning of the Convention;

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and therefore that the liability of the defendants was not limited to the English equivalent of 125,000 francs.

On appeal:—

Held (by Greene L.J. and Talbot J., Greer L.J. dissenting), that there was one carriage only—namely, from London to Antwerp and back; that it was "international carriage"; and therefore that the damages recoverable were limited to the English equivalent of 125,000 francs.

Semble, the words "act, neglect or default" in the Fatal Accidents Act, 1846, are wide enough to include a negligent breach of contract.

Decision of Lewis J. reversed in part.

APPEAL from Lewis J.

The plaintiff sued on behalf of herself and her daughter, claiming damages under Lord Campbell's Act in respect of the death of her husband, who was killed in an accident in Belgium when travelling back from Antwerp to London as a passenger in one of the defendants' aeroplanes which collided with a wireless station near Ruysselede owing, as she alleged, to the negligent management of the aeroplane.

On December 15, 1933, the deceased Mr. Grein applied at one of Messrs. Cook's offices in London for a ticket by aeroplane to Antwerp and back, and in return for a payment of 6*l.* 8*s.* he received a voucher which he could, and did, exchange at Victoria Station at the defendants' office for a ticket available for fifteen days issued in three parts, one being that which he had to give up at the place of departure, another to be given up at the place of destination, and the third he was to keep. The ticket stated the fare—namely, 4*l.* for the outward journey and 2*l.* 8*s.* for the journey from Antwerp to London. There was an agreed stopping place at Brussels. On the back of the ticket was this clause: "The contract of carriage is subject to the General Conditions of Carriage of Passengers and Baggage, which are applicable to both internal and international carriage. These General Conditions of Carriage are based upon the Convention of Warsaw of October 12, 1929, in so far as concerns international carriage within the special meaning of the said Convention. An extract from these conditions is printed upon the cover of this ticket."

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The defendants denied negligence, and alleged that the case was one of "international carriage" within the meaning of the Carriage by Air Act, 1932 (1); they relied, alternatively, on the contract, the terms of which are set out in the judgment of Greer L.J. and which are similar to the provisions of the Convention as barring any action under Lord Campbell's Act.

The statement of claim was afterwards amended by claiming, in the alternative, the English equivalent of 125,000 French

(1) Carriage by Air Act, 1932, s. 1, provides that the Convention of Warsaw of October 12, 1929, as set out in Sch. I. to the Act, is to have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies.

Art. 1 of the Convention: "This Convention applies to all international carriage of persons . . . . by aircraft for reward. . . . ."

Art. 1 (2.): "For the purposes of this Convention the expression 'international carriage' means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty . . . . of the same High Contracting Party is not deemed to be international for the purposes of this Convention."

Art. 1 (3.): "A carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

Art. 17: "The carrier is liable for damage sustained in the event of the death or wounding of a passenger . . . . if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Art. 20 (1.): "The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Art. 22 (1.): "In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. . . . ."

francs, i.e., 1670*l.*, the amount to which the rights of the dependants were limited by art. 22 (1.) of the Convention if the case were held to be one of "international carriage."

LEWIS J. held that the deceased met his death owing to the negligence of the defendants' pilot when, after failing to get a landmark owing to a fog, he went on flying in the direction of the Ruysselede wireless mast, instead of turning back or turning due north or south, or waiting to get into communication with a certain wireless station; and he held that such negligence would, if death had not ensued, have entitled the deceased to maintain an action for damages, and that the plaintiff, as his widow, had suffered damages in consequence of the death of the deceased. He referred to the arguments of the defendants that by the conditions on the ticket issued to the deceased he would have had no right of action himself had he survived, and if that was so one of the essentials to a cause of action by the widow under Lord Campbell's Act was not satisfied, and that, even assuming that the deceased would have had a right of action, he had limited the amount of damages recoverable to the sum of 125,000 francs. On the first of these contentions he (the judge) held on the true construction of the conditions that there was no such exclusion of liability. On the second of these points the decision of the Court of Appeal in *Nunan* v. *Southern Ry. Co.* (1) was an authority for the proposition that an agreement by a person with a carrier that he shall be entitled to limit his liability to a certain sum does not entitle the carrier, in an action under Lord Campbell's Act, to say that the plaintiff in that action is similarly restricted as to the amount of damages. As to the arguments of the defendants based on the provisions of the Carriage by Air Act, 1932, and the Convention set out in Sch. I. to that statute, by which, if there is no special contract, the amount of damages is limited to 125,000 francs, and their contention that the carriage of the deceased from Antwerp to London was a part of one carriage which commenced in London and finished in London, which therefore was

(1) [1924] 1 K. B. 223.

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"international carriage," he held that, having regard to the facts, namely that separate tickets were issued to the deceased: one from London to Antwerp and the other from Antwerp to London, and on one part of the ticket the fare—4*l.*—was stated and on the other the return fare of 2*l.* 8*s.* was stated, and the passenger, if he had not been able to return within the fifteen days for which it was valid, would have been entitled to a refund of the 2*l.* 8*s.*, there were two carriages, and as the carriage during which the deceased met his death was from a place of departure not within the territory of a High Contracting Party to a place of destination within the territory of a High Contracting Party, it was not "international carriage" within the meaning of the Act. That being so the plaintiff as the deceased's widow was entitled to proceed under Lord Campbell's Act and to recover damages which he assessed at 4000*l.*—3500*l.* for herself and 500*l.* for her daughter. If, however, he was wrong in so holding, and the Act of 1932 applied, the amount to which the plaintiff would be entitled would be the English equivalent of 125,000 francs apportioned in the same way.

The defendants appealed.

A. T. Miller K.C. and *H. G. Robertson* for the appellants. Lewis J. was wrong in holding that there were two distinct carriages involved in the taking of the ticket by the deceased; there was one contract only and one carriage for the journey from London to Antwerp and back, and the fact that the fare was split up was merely for the convenience of the passenger and to enable him to obtain a refund of the return portion if he did not travel back within fifteen days. Being a journey from the territory of one High Contracting Party with an agreed stopping place within the territory of another Power, it was "international carriage" within the definition of art. 1 (2.) of Sch. I. to the Carriage by Air Act, 1932. From that it follows that the liability of the appellants, if any, is limited by art. 22 to 125,000 francs. The respondent cannot recover under Lord Campbell's Act, as that liability is excluded in terms by the contract of carriage and by s. 1, sub-s. 4, of the Carriage by Air Act, 1932. If the deceased contracted himself out of a right to maintain an action in respect of the act, neglect or default of another person, then, on his death, his personal representatives cannot sue in respect of such act, neglect or default: *Haigh* v. *Royal Mail Steam Packet Co.* (1); *The Stella.* (2) It is not enough that the deceased, if he had survived, would have had a cause of action in negligence, as that claim might be defeated by various defences, such as common employment: *Senior* v. *Ward* (3); *Coldrick* v. *Partridge Jones & Co.* (4); or contributory negligence: *Tucker* v. *Chaplin & Horne* (5); see also *Read* v. *Great Eastern Ry. Co.* (6); and *Griffith* v. *Dudley (Earl).* (7) In *Nunan* v. *Southern Ry. Co.* (8) it was held that where a person who had agreed with a railway company that its liability in respect of personal injuries should not exceed a certain sum was killed owing to the negligence of the company's servants, the damages recoverable by the personal representatives were not limited to such agreed sum, inasmuch as the right of action given to the personal representatives was distinct from that which the deceased would have had if he had survived. That decision, however, has no application to the facts of the present case. A carrier's obligation, as was laid down in *Readhead* v. *Midland Ry. Co.* (9), with regard to the carriage of passengers is not absolute; it is merely to use due care and foresight, and a breach of that obligation gives rise to an action in tort. It was, however, never intended that outside his contractual liability the carrier should be under a liability in tort unlimited as to amount. If the Carriage by Air Act, 1932, applies, the appellants' liability is limited to the amount stated in art. 22 of the Convention, but that liability does not attach if the carrier proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him to take such measures: see art. 20. We contend that the appellants have discharged the onus thus put upon them. The accident occurred without negligence on their part—namely, owing to the fog and the absence of signals from the wireless station.

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(1) (1883) 52 L. J. (Q. B.) 640.
(2) [1900] P. 161.
(3) (1859) 1 E. & E. 385, 393.
(4) [1910] A. C. 77.
(5) (1848) 2 Car. & K. 730, 732.
(6) (1868) L. R. 3 Q. B. 555, 558.
(7) (1882) 9 Q. B. D. 357.
(8) [1924] 1 K. B. 223.
(9) (1869) L. R. 4 Q. B. 379.

Harold Murphy K.C. and *Clive Burt* for the respondent. The ticket issued to the deceased can be regarded as creating two contracts, but if that is not the correct view there were clearly two carriages—one from London to Antwerp and the second from Antwerp to London, and Belgium not being a High Contracting Party to the Convention of Warsaw it follows that the journey from Antwerp during which the deceased met his death, owing, as has been found, to the negligent management of the aeroplane, was not "international carriage," and therefore the Carriage by Air Act, 1932, does not apply so as to limit the liability of the appellants to the amount specified in art. 22. The action was therefore properly brought under Lord Campbell's Act, by which, if the deceased had a claim for damages if he had only been injured, that claim does not disappear by his death. There is inherent in the contract that no avoidable injury will be caused to the passenger; an injury causing his death was committed owing to the negligent management of the aeroplane. In those circumstances *Haigh* v. *Royal Mail Steam Packet Co.* (1) and *The Stella* (2), in which all liability was excluded, do not apply, and the case is governed by *Nunan* v. *Southern Ry. Co.* (3), in which it was decided that where a passenger who had agreed with a railway company that their liability for personal injury should not exceed a certain sum was killed by the negligence of the company's servants, the damages recoverable by his dependants in an action under Lord Campbell's Act were not limited to that agreed sum.

A. T. Miller K.C. in reply. The contract in this case has used language making it plain that all implied duties were renounced. The deceased agreed that if he was injured he

(1) 52 L. J. (Q. B.) 640.
(2) [1900] P. 161.
(3) [1924] 1 K. B. 223.

was to be paid only a specific sum, and save so far as the contract provides for payment all rights are given up by the passenger. *Nunan's* case (1) has therefore no application. With regard to the point whether the carriage was "international carriage," it is to be observed that the contract was for a return journey at an inclusive fare; the fare was paid as a unit for the whole journey—to Antwerp and back—and therefore came within the definition of "international carriage," and the fact that the ticket did not say so in terms is immaterial.

Cur. adv. vult.

July 13. The following judgments were read:—

GREER L.J. This is an appeal by the defendants from the judgment of Lewis J. whereby he awarded to the plaintiff for herself and her daughter, as dependants, the sum of 4000*l.* damages in respect of a claim under the Fatal Accidents Act, 1846, commonly known as Lord Campbell's Act. Mrs. Grein's late husband was killed in an accident in Belgium when travelling as a passenger in the defendants' aeroplane the *Apollo*, through the aeroplane colliding with the large wireless station near Ruysselede. The plaintiff alleged that the death of her husband was due to the negligent management of the aeroplane. The defendants by their defence, as it was after the amendment at the trial, raised the following defences: (1.) They denied all the allegations of negligence. (2.) They alleged that the case was one of "international carriage" within the meaning of the Carriage by Air Act, 1932, which gave the force of law to Articles agreed to at the Convention of Warsaw. (3.) They relied, alternatively, on a clause in the contract as putting an end to the right of action of the deceased, and therefore barring the dependants from bringing an action based on Lord Campbell's Act. The action was partly heard before the long vacation in 1935,

(1) [1924] 1 K. B. 223.

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and resumed in the following Michaelmas term. Until the action was resumed after the long vacation the defendants had not by their pleadings or at the hearing raised the point that the case was governed by the Carriage by Air Act, 1932, but they were allowed to amend their defence to raise this question, the plaintiff having also leave to amend her claim. The statement of claim was then amended by claiming in the alternative the English equivalent of 125,000 French francs, i.e. 1670*l.*, the amount to which the rights of the dependants were limited if the case was held to be one of "international carriage."

I propose to consider the second and third questions before dealing with the judge's findings of negligence. It is necessary to state in some detail the facts proved before the Court of Appeal with reference to the contract made between the late Mr. Grein and Imperial Airways, Ld. At the hearing of the action the legal advisers of the plaintiff and the defendants thought that the ticket taken out by Mr. Grein was a return ticket to Brussels and back, and a copy of a return ticket to Brussels was accepted by both sides as representing the ticket taken by the deceased. Before the case reached the Court of Appeal it was discovered that a mistake had been made, and that the ticket which had been taken out—the outward half of which had been given up at Antwerp—was a return ticket to Antwerp. When this appeared, we thought it right to admit evidence of the circumstances attending the taking of the return ticket to Antwerp. It was proved that the deceased had on December 15, 1933, applied to Messrs. Cook's representative at 30 Mincing Lane, London, for a ticket to Antwerp and back. At this agency Messrs. Cook's local agents did not issue a ticket, but secured a reservation, accepted payment of the amount payable for a return ticket to Antwerp, in accordance with the advertised price, and gave the applicant a voucher which he could exchange at the defendants' office at Victoria Station for a ticket. The deceased paid to Messrs. Cook's agent the sum of 6*l.* 8*s.*, which was the advertised price of a return ticket to Antwerp, and received from him a voucher in the following form :—

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" Form No. 293B. No. GB/EVB 12482.

Head Office :
IMPERIAL AIRWAYS Ltd.
and/or subsidiary &
associated Companies.
Airway Terminus
Victoria Station
London, S.W.1.
Telephone : Victoria 2211.
Telegrams : Impairlim.

EXCHANGE
VOUCHER B.

This original
for
passenger.

To the Booking Clerk :—

IMPERIAL AIRWAYS Ltd.
Victoria, S.W.

Date 15–12–33.

In exchange for this voucher please furnish Bearer Mr. J. T. Grein with one 15 day return ticket by air from London to Antwerp via Brussels valid for 23rd December 1933 at 9.30 hrs.

Amount of fare(s) . .	£6	8	0
Amount paid . . .	£6	8	0
Balance (if any) to be paid on receipt of ticket(s) .	£		

THOS. COOK & SON LTD.
15th DEC. 1933
30 MINCING LANE E.C.3

Agent.

Office.

NOT TRANSFERABLE.—Issued subject to the terms and conditions printed overleaf."

On the back of the voucher there were printed these words :—

" Terms and Conditions. This voucher must be presented at the Office on which it is drawn. It is issued subject to accommodation being available, and to any adjustment of fares which may occur before date of presentation, owing to change of route or alteration in rates or any other circumstances. This voucher is issued by Imperial Airways Limited, its Subsidiary Companies, and/or their agents on the express condition that the contract of carriage hereby contemplated is *subject to the General Conditions of Carriage of Passengers and Baggage,* which are applicable to both internal and international carriage. These General Conditions of Carriage are based upon the Convention of Warsaw of October 12, 1929, in so far as concerns international carriage within the special meaning of the said Convention. The said Conditions are available for inspection at the Company's offices and an

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extract therefrom is printed upon the cover of the ticket to be issued in exchange for this voucher."

On December 16 Mr. Grein went to the defendants' office at Victoria Station, where he received in exchange for the voucher a ticket the outward part of which is as stated hereunder. The ticket consisted of three parts marked C, B and A, C being the counterfoil for the passenger to keep, B the part which he had to give up at the destination, and A the part which he has to give up at the place of departure. The only parts that could be reproduced in Court were parts A and B. The following is a true copy of parts A and B :—

A.

Imperial Airways Ltd.
No. CB/OCR (*a*)
Fare £4 0 0
From London
To Antwerp
Valid for
Date 23/12/33
Car Departure 09.45
Air ,, 09.30
Service ....
Agent.
I.A.L.
Stamp.
For Airport of Departure.

OVERPRINTED
15 day RETURN

B.

IMPERIAL AIRWAYS LIMITED.
and/or Subsidiary Companies.
No. CB/OCR. 510544 (*a*) Fare £4 0 0
Passenger's Name Mr. J. T. Grein
From London
To Antwerp
Agreed Stopping Places...As per ....
.... Company's Timetable.
Name and address of Carrier or Carriers ...Sebona, Brussels.
For Conditions of Carriage : See Back.
Valid for { Date 23/12/33 Agent.
Departure { Car. 09.40.
Air. 09.30.
Service .... I.A.L.
Stamp.
Place of issue...London.
Date of issue...16/12/33.
For Airport of Destination.

OVERPRINTED
RETURN
VALID FOR 15 DAYS
FROM DATE OF ISSUE.

On the back of B appears : "The contract of carriage is subject to the General Conditions of Carriage of Passengers and Baggage, which are applicable to both internal and international carriage. These General Conditions of Carriage

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are based upon the Convention of Warsaw of October 12, 1929, in so far as concerns international carriage within the special meaning of the said Convention. An extract from these Conditions is printed upon the cover of this ticket."

It is impossible to reproduce part C, as this was retained by the passenger, and was probably lost with him. This, however, is unimportant, the most material portion of the outward part of the ticket being the portion marked B. With regard to the return portion of the ticket, the only part that could be produced was that which is marked A, being the part given up by the passenger on taking his place in the aeroplane at Antwerp. Part A of the return half of the ticket was in the following words :—

A.

IMPERIAL AIRWAYS LIMITED.
No. CB/OCR (*b*)
510544
Fare £2 8 0
From Antwerp
To London
Valid for
Date 30/12/33.
Car Departure 11th
Air ,, SAB./I.A.L.
Service 501A.
Agent.
I.A.L.
Stamp.
For Airport of
Departure.

OVERPRINTED
15 day RETURN.

No doubt the other two parts of the ticket were similar in form to the outward part, with the difference that the journey would be described as from Antwerp to London instead of London to Antwerp, and there would be a reference in part A to an airport of departure, and in part B to an airport of destination. It seems clear that until Imperial Airways, Ld., issued a ticket to Mr. Grein in exchange for a voucher they made no contract with him to carry him to Antwerp on the proposed date, and back to London if he presented himself for the return journey in the period of fifteen days. If no accommodation was available, Imperial Airways, Ld., could have refused to issue him a ticket ; if it was available on the date mentioned the proposing passenger would be entitled to receive a ticket incorporating the general conditions, and when issued the ticket and general conditions would constitute the contract of carriage entered into between the traveller and Imperial Airways, Ld. It seems quite clear that if a passenger took one ticket outwards for London to Antwerp and another inwards for Antwerp to London, neither the carriage from London to Antwerp nor the carriage from Antwerp to London would be " international carriage." I cannot see that if the passenger pays for both journeys in advance when he buys his ticket for the two journeys in London at a reduced fare, this can be held to make the return journey " international carriage." Both on the outward half and on the inward half the following words were endorsed : " The contract of carriage is subject to the General Conditions of Carriage of Passengers and Baggage, which are applicable to both internal and international carriage. These General Conditions of Carriage are based upon the Convention of Warsaw of October 12, 1929, in so far as concerns international carriage within the special meaning of the said Convention. An extract from these Conditions is printed upon the cover of this ticket." Thus each half of the ticket contained a complete record of the undertaking of Imperial Airways, Ld., with regard to the journey or carriage to which it applied, whether outward or return. Art. 2 of the General Conditions so far as material is as follows :—Para. 1 : Before he begins his journey the passenger must be provided with a passenger ticket. Para. 2 : The passenger is bound to retain his ticket throughout the journey. He must when required produce it to any official in charge and surrender it at the end of the journey. Para. 3 : (1.) The passenger ticket shall contain the following particulars: (*a*) the place and date of issue; (*b*) the places of departure and destination; (*c*) the name and address of the carrier or carriers. The passenger ticket shall contain also the name of the passenger and the amount of the fare. The paragraphs apply to all contracts of carriage whether international or not. Sub-paras. (2.) and (3.) of para. 3 read as follows:—"(2.) So far as concerns international carriage, as defined by art. 1, para. 2, the passenger ticket shall contain in addition the following particulars: (*d*) the agreed stopping places, for which summarized descriptions published by the carrier may be used; (*e*) a statement that the carriage is subject to the rules relating to liability set out in the Convention of Warsaw of October 12, 1929, upon which these Conditions are based. (3.) The carrier has the right to alter the agreed stopping places in case of necessity without any such alteration having the effect of depriving international carriage, as defined by art. 1, para. 2, of its international character within the meaning of this provision." These sub-paragraphs refer only to a contract for international carriage. Art. 13 provides as follows:—"Art. 13: Conclusion of the contract of carriage. Para. 1: Except as provided by art. 2, para. 6, and art. 9, para. 3, the contract of carriage is made effective immediately on acceptance by the passenger of the passenger ticket, and, so far as concerns the carriage of baggage, the baggage check." Art. 16 is in the following words: "Refunds. Para. 1: No claim for refund of the fare paid for carriage can be entertained when a traveller does not arrive or arrives late for a journey for which a reservation has been made. Para. 2: If a flight is cancelled owing to meteorological conditions or for any other reason, or if the aircraft returns to the airport of departure with the passenger the latter shall be entitled to the return of the fare paid for the carriage of himself and his baggage. Para. 3: In the event of a flight being interrupted the passenger is entitled to the return of a proportion of the fare paid for himself and his baggage corresponding with the non-flown mileage, unless the carrier completes the carriage by other means or makes himself responsible for the cost of forwarding by other means of transport. In such event he shall only be liable to refund the difference in fare, if any. Para. 4: All rights to refund are extinguished unless a claim is made within a period of three weeks from the date fixed for the journey." I reserve consideration of the Articles relating to the liability of carriers, as they appear to me to be material only to the third question raised by this appeal.

For the definition of "international carriage" reference must be made to art. 1, para. (2.), of the Convention, which is given the force of law in the territories of the United Kingdom by the Carriage by Air Act, 1932. Sect. 1 of the Act, the marginal note to which says: "Provisions of Convention to have force of law," provides: "(1.) As from such day as His Majesty may by Order in Council certify to be the day on which the Convention comes into force as regards the United Kingdom, the provisions thereof as set out in the First Schedule to this Act shall, so far as they relate to the rights and liabilities of carriers, passengers, consignors, consignees and other persons and subject to the provisions of this section, have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage. (2.) His Majesty may by Order in Council from time to time certify who are the High Contracting Parties to the Convention, in respect of what territories they are respectively parties and to what extent they have availed themselves of the provisions of the Additional Protocol to the Convention, and any such Order shall, except in so far as it has been superseded by a subsequent Order, be conclusive evidence of the matters so certified. (3.) Any reference in the said First Schedule to the territory of any High Contracting Party to the Convention shall be construed as a reference to the territories subject to his sovereignty, suzerainty, mandate or authority, in respect of which he is a party. (4.) Any liability imposed by Article seventeen of the said First Schedule on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any statute or at common law, and the provisions set out in the Second Schedule to this Act shall have effect with respect to the persons by and for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced. (5.) Any sum in francs mentioned in Article twenty-two of the said First Schedule shall, for the purposes of any action against a carrier, be converted into sterling at the rate of exchange prevailing on the date on which the amount of any damages to be paid by the carrier is ascertained by the court." As I read sub-s. 4 it only applies to a case of liability arising out of a contract for international carriage, and has no application to a contract for a "carriage" that is not international. [The Lord Justice read art. 1 (2.) of the First Schedule defining "international carriage" already set out, and continued:] At all material times Belgian territory was not the territory of a High Contracting Party.

The accident in which Mr. Grein lost his life occurred at the Wireless Station near Ruysselede in Belgium, and to bring the "carriage" or journey within the Schedule the carriage or journey must be one which by the contract was one from London to London via Antwerp as a stopping place. In my judgment the "carriage" which was in course of being performed by the appellants' aeroplane at the time of the accident was plainly by the terms of the contract not a carriage from London to London, with a stopping place at Antwerp. The contract, in my judgment, was one in which Imperial Airways, Ld., undertook to carry the deceased from London as the place of departure to Antwerp as the destination, with an additional undertaking, subject to certain conditions, to carry him back from Antwerp to London. With all respect to those who differ from me, I think the contract was a contract to carry Mr. Grein to Antwerp, with a stopping place at Brussels (see time-table), and to carry him back from Antwerp to London if he complied with certain agreed conditions (which it is unnecessary for the present purpose to specify), with a stopping place at Brussels. If I take a ticket at Euston for Liverpool, Euston is my station of departure and Liverpool my destination, whether I take a single ticket or a return ticket. Suppose, for the sake of illustration, I have taken a return ticket. The porter at Euston asks me what is my destination, my answer would be Liverpool. If I ask him what are the stopping places on the journey he would probably in most cases say Rugby and Crewe ; he would certainly not say Liverpool. It would, in my opinion, be a misuse of language to describe the journey I was about to take as a journey from Euston to Euston with a stopping place at Liverpool. In the present case the return part of the ticket cannot be produced as it was destroyed with the passenger, but we have the outward half given up at Antwerp, and the part of the inward half given up at Antwerp when Mr. Grein took his seat in the ill-fated *Apollo*, and we are entitled to conclude that the destroyed ticket was in the same terms as the part given up at Antwerp. The outward half describes the carriage or journey as from London to Antwerp with agreed stopping places as per company's time-table. The only stopping place in the time-table is Brussels. The ticket contained, partly in print and partly in writing, " Return Valid for 15 days " and stated the fare (for the outward journey) as 4*l.* As appears from the part of the return half " A " the fare is stated to be 2*l.* 8*s.*, and the journey as one from Antwerp to London. The specimen ticket used at the trial under the impression that the ticket was to Brussels and back, shows that the return half to be given up at Croydon or may be at Victoria, contained the words " Agreed stopping places as per company's time-table." In my judgment, the contract made by the company with Mr. Grein was to carry him by aeroplane from Croydon to Antwerp, with an agreed stopping place at Brussels, with an additional undertaking subject to certain conditions to carry him back for a fare of 2*l.* 8*s.* from Antwerp to Croydon, with a stopping place at Brussels. If this be right, the journey on which he met with his death was not " international carriage," and the plaintiff's claim is not limited to 125,000 francs.

If it be suggested that the statute falls to be interpreted in the light of the Articles of the Warsaw Convention this is indeed true to this extent, that if there be any doubt or ambiguity in the language used, the statute should be so interpreted as to carry out the express and implied provisions of the Convention. But in my judgment the definition contained in the Convention makes the character of the carriage or journey depend on the contract entered into by the passenger with the carrier. In the present case the contract seems to me clearly to be a contract for two carriages, as I have already stated. If it be said that so to construe the statute and the contract leaves unsolved a problem that the Convention was intended to solve, i.e., the problem of deciding which law should be applied to liability for "accident," this problem is definitely not solved in the case of a return ticket from Antwerp to London, nor in respect of a single ticket either way, and it is accordingly wrong in my opinion to assume that the Convention was intended, in the case of carriage between the territory of a High Contracting Party and that of a non-contracting party, to avoid the difficulty of deciding which law should apply. It falls too far short of fulfilling such intention to justify the assumption.

The appellants' second contention raises a question of very great difficulty. If it be right, the remedy of the plaintiff under Lord Campbell's Act is entirely barred, and she will be worse off than if the contract be one of "international carriage." It is contended that Lord Campbell's Act only applied to acts neglects or defaults which are torts, and has no application to a claim based on breach of contract, even though the breach be a breach of an undertaking to carry with reasonable skill and care, and two cases mentioned in the judgment of Lewis J. were especially relied on. It is plain from the express words of Lord Campbell's Act that if for any reason the deceased could not have brought any action for his own damages at the time of his death, the dependants have no right of action. And, argued the appellants, by art. 18, para. 5, of the Conditions of Carriage, the deceased having given up all his rights of action otherwise than under the contract, the failure to perform their contract

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was not an act neglect or default for which, had he lived, Mr. Grein could have maintained an action and recovered damages. The argument was in two parts. First, it was said that the words " act neglect or default " referred only to acts neglects or defaults that are torts, and do not refer to acts neglects or defaults that are mere breaches of contract, and it was argued, in the second place, the only breach of contract in respect of which Mr. Grein could have claimed was the breach of a promise to pay him damages if he was injured by accident, and that this breach—the failure to pay damages —was not the cause of his death. It is therefore important to decide in the first place what was the nature of the breach of contract which would have given rise to a claim for damages by Mr. Grein if he had been hurt instead of being killed.

Art. 18, para. 2, of the Conditions of Carriage says: " The liability of carriers under the provisions of art. 19, para. 1, sub-para. 1 (*a*), applies to accidents occurring on board the aircraft or in the course of any of the operations of embarking or disembarking."

Then para. 5 says: " Passengers and baggage are accepted for carriage only upon condition that, except in so far as liability is expressly provided for in these conditions of carriage, no liability whatsoever is accepted by the carriers, or their employees, or parties or undertakings employed by them in connection with their obligations, or their authorised agents, and upon condition that (except in so far as liability is expressly provided for in these Conditions) the passenger renounces for himself and his representatives all claims for compensation for damage in connection with the carriage, caused directly or indirectly to passengers or their belongings, or to persons who, except for this provision, might have been entitled to make a claim, and especially in connection with surface transport at departure and destination, whatever may be the legal grounds upon which any claim concerning any such liability may be based."

Then art. 19, para. 1 (*a*), says: " In the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger." Then para. 1 (3.) says:

" Carriers are not liable if they prove that they and their agent have taken all necessary measures to avoid the damage, or that it was impossible for them to take such measures. In the carriage of baggage the carriers are not liable if they prove that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation, and that, in all other respects, they and their agents have taken all necessary measures to avoid the damage." Then para. 2 (1.) says: " In the carriage of passengers the liability of carriers for each passenger is limited to the sum of 125,000 francs unless a larger sum has been agreed upon. Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs."

The contract seems to me to mean that the carrier promises to be liable for damage due to accident provided that he is not to be liable if he proves that by his agents or servants he exercised all reasonable skill and care in taking all necessary measures to avoid causing damage by accident to the passenger, or proves that it was impossible to take such measures. This seems to me to amount to a promise not to injure the passenger by avoidable accident, the onus being on the carrier to prove that the accident could not have been avoided by the exercise of reasonable care: see per Lord Dunedin in *City of Montreal* v. *Watt & Scott.* (1) Damages are payable for breach of contract not because the contract is to pay damages, but by reason of a breach of contract in respect of which the Court awards damages. By the finding of the learned judge, with which I agree (as will shortly appear), I think it was sufficiently proved that the appellants failed to exercise the measure of skill and care required of them, and thereby broke their contract with Mr. Grein, and would have been liable to him for such breach if he had survived. Lord Campbell's Act provides as follows: " Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the

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death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in Law to felony." In my judgment the liability arises where the wrongful act is a breach of contract to exercise reasonable care, and if the death of a passenger is occasioned thereby an action lies under Lord Campbell's Act on behalf of the dependants there mentioned. A failure to exercise reasonable care is a "neglect" whether the duty to exercise such care arises from contract or as the result of a tort. It is a wrongful neglect if it be a breach of contract, even though the contract prohibits an action of tort.

The two cases relied on, *Haigh* v. *Royal Mail Steam Packet Co.* (1) and *The Stella* (2), are not applicable, as in those cases the deceased in respect of whose death the actions were brought had given up for good consideration all claims, whether in contract or tort. The principle of law from which the rule "Actio personalis moritur cum persona" is derived was considered in *Baker* v. *Bolton* (3) and in *Admiralty Commissioners* v. *S.S. Amerika.* (4) It was based on a long settled rule of law that in a civil Court the death of a human being cannot be complained of as an injury: see per Lord Sumner. (5) The object of Lord Campbell's Act was to get

(1) 52 L. J. (Q. B.) 640.
(2) [1900] P. 161.
(3) (1808) 1 Camp. 493.
(4) [1917] A. C. 38.
(5) Ibid. 50.

rid of the rule that no cause of action could arise from the death of a third person by wrongful act, neglect, or default, as that was a public wrong and not a private injury. There is no report of any case deciding that where negligence gives rise to a claim for breach of contract Lord Campbell's Act gives no remedy to dependants. In my judgment a liberal interpretation should be given to the Act, and the words "act, neglect, or default" should be held wide enough to include a negligent breach of contract.

In *City of Montreal* v. *Watt & Scott* (1) Lord Dunedin, in interpreting the words contained in the Canadian Code with regard to liability imposed on those who had things under their control, stated that in their Lordships' view the words "unable to prevent the damage complained of" meant "unable by reasonable means. It does not denote an absolute inability." These words seem to me to be applicable to art. 18 of the General Conditions. The result of this is, in my judgment, that the appellants undertook liability for what are described in the contract as accidents unless they were able to establish that they could not by reasonable means have avoided causing the damage. The effect of this is to put upon them the obligation of disproving negligence, leaving them liable for damages for negligence if they failed to disprove it. Even without the assistance of Lord Dunedin's judgment I think this is the right construction to give to the Article in question, otherwise the person suffering damage by accident would be able to recover unless the defendants established that nothing whatever that they could have done would have prevented the damage complained of. The damage would not have occurred if the aeroplane had not started on the day in question, even though, as the judge has found, it was quite reasonable and proper for the aeroplane to start. The learned judge has summarized with great care all the facts relating to the question whether negligence was sufficiently proved. It seems to me quite clear that the deceased man, while retaining his own right to sue for damages, cannot deprive his dependants of their rights under Lord

(1) [1922] 2 A. C. 555.

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Campbell's Act. They are not prevented from suing in cases in which he has given up his rights because they are bound by the deceased's contracts, but because by the express words of the statute their right to sue for their damages is subject to the deceased having had a right to sue for his own damages at the date of his death. But an agreement by the deceased to limit his damages is not binding on the dependants. In *Nunan* v. *Southern Ry. Co.* (1) Scrutton L.J. says: "The Fatal Accidents Act, has, I think, been interpreted, by authorities which are binding on us, to mean that the dependants have a new cause of action, yet cannot recover on that cause of action unless the deceased had at the time of his death a right to maintain an action and recover damages for the act, neglect or default of which they complain. He may have lost such a right in a number of ways; he may have been guilty of contributory negligence; he may have made a contract by which he excluded himself from the right to claim damages, and in such a case as that the decisions in *Haigh* v. *Royal Mail Steam Packet Co.* (2) and *The Stella* (3) show that the right of his dependants would be also barred. Again he may have lost his right from failure to make a claim within the period limited by some statute; or he may have lost it by reason of a release by accord and satisfaction. In all these cases, if he could not have brought an action at the time of his death neither can his dependants. Then it is argued that if that is so his dependants must equally be bound if he has made an agreement which, while leaving him a cause of action, limits the amount which he can recover. I agree that it looks odd that he should be able to bar his dependants entirely, and yet should not be able to bar them in part, but one must be guided by the words of the statute. The moment one attempts to transfer the provisions as to the amount of the liability (as distinguished from the liability itself) from the contract of the deceased to the rights of his dependants one gets into a difficulty. For their damages are not the same as the damages of the deceased; they are calculated on quite a different principle. . . . . Under these circumstances we must follow the language of the statute, and that language compels us to say that as the dead man could at the time of his death have brought an action for some damages his dependants can bring an action for their own and quite different damages. I agree that the appeal must be dismissed." Atkin L.J. says (1): "The words of the section are satisfied; the man had at the time of his death a right to maintain an action and recover some damages; and that is enough. The answer to the former alternative is that the dependants under the Fatal Accidents Act have an entirely different cause of action from that which the deceased person had. In the words of Lord Blackburn in *The Vera Cruz* (2) their cause of action is 'new in its species, new in its quality, new in its principle, in every way new.' Under those circumstances, if the contract made by the deceased is only a contract that puts a limit to the amount of the damages that he can recover, it is difficult to see how that can have any relation to a claim made by the dependants on a different cause of action and in respect of a different measure of damages. The circumstances may be entirely different. The deceased person could, if he were alive, only bring an action to recover compensation for his own personal injuries, which ex hypothesi fall short of the consequences of his death. . . . . For my part I fail to see any logical relation between the fact that there is a limit to the damages which the deceased person could have recovered and the amount of the damages recoverable by the dependants." I agree with Lewis J.'s view that there was no negligence before Gittins the pilot sent his unavailing message asking for his bearing, and I also agree with his conclusion that after the pilot failed to get any message from Haren he was guilty of negligence in continuing his flight at a height below the height of the wireless masts instead of trying to get above the cloud, or, if that was too dangerous, turning round to go back to Haren. He must have known that he was approaching the vicinity of the wireless station. He had lost his way and did not know whether he was south or north of the railway, and he chose the least prudent of several courses open to him.

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(1) [1924] 1 K. B. 223, 227.

(2) 52 L. J. (Q. B.) 640.

(3) [1900] P. 161.

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(1) [1924] 1 K. B. 229.

(2) (1884) 10 App. Cas. 59, 70.

It was further argued by Mr. Robertson that we ought to hold the damages excessive. I think the judge's estimate was not an unreasonable estimate of the loss which in all probability the widow and daughter of Mr. Grein suffered by his death, and I see no reason why we should order a new trial on the ground of excessive damage. I refer to what I said in *Flint* v. *Lovell* (1) as to the considerations that ought to weigh with the Court of Appeal when asked to order a new trial on the ground that the damages awarded are too large. I fail to see any good ground for regarding them as excessive in the present case. The learned judge had to consider the probability of a successful business man like Mr. Grein recovering from the effect of the slump and regaining his ability to earn a large income out of which he might be expected to make adequate provision for his wife and daughter.

If my judgment prevailed, the appeal would be dismissed with costs.

GREENE L.J. The Carriage by Air Act, 1932, was passed for the purpose of giving binding effect in this country to the Convention signed at Warsaw on October 12, 1929, a translation of which (omitting the preamble) is set out in the Schedule to the Act. In approaching the construction of such a document as this Convention it is, I think, important at the outset to have in mind its general objects so far as they appear from the language used and the subject-matter with which it deals. The object of the Convention is stated to be "the unification of certain rules relating to international carriage by air." By "unification of certain rules" is clearly meant "the adoption of certain uniform rules," that is to say, rules which will be applied by the Courts of the High Contracting Parties in all matters where contracts of international carriage by air come into question. The rules laid

(1) [1935] 1 K. B. 354.

down are in effect an international code declaring the rights and liabilities of the parties to contracts of international carriage by air; and when by the appropriate machinery they are given the force of law in the territory of a High Contracting Party they govern (so far as regards the Courts of that Party) the contractual relations of the parties to the contract of carriage of which (to use language appropriate to the legal systems of the United Kingdom) they become statutory terms.

The desirability of such an international code for air carriage is apparent. Without it questions of great difficulty as to the law applicable to a contract of international carriage by air would constantly arise. Our Courts are familiar with similar questions arising under contracts of through carriage otherwise than by air; and it is easy to imagine cases where questions of the greatest difficulty might arise as to which law or laws governed the contract and whether different laws might not apply to different stages of the journey. So far as regards questions which have arisen in our Courts I need do no more than refer to such well known cases as *Peninsular & Oriental Steam Navigation Co.* v. *Shand* (1) and *Cohen* v. *South Eastern Ry. Co.* (2), and to the discussion of the subject in Dicey's Conflict of Laws (5th ed.), beginning on p. 693. It is not too much to suppose that similar questions would arise in the Courts of foreign countries; and it may well be that those Courts would follow principles different to our own in deciding the proper law applicable in the various cases which might arise. In the case of air carriage examples of the confusion which might arise in the absence of an international code readily suggest themselves. Thus different laws might be held to apply according as a ticket (to take a simple case) was taken in Paris for a flight to London or in London for a flight to Paris, according as the carrier was a French or an English Company, according as an accident took place in England or in France. Where the carriage is effected by stages covering several countries and involving aeroplanes belonging to companies incorporated in several

(1) (1865) 3 Moore P. C. (N. S.) 272.

(2) (1877) 2 Ex. D. 253.

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countries, the difficulties increase as well as the unlikelihood of finding in the various countries in which actions might be brought any uniformity of legal principles for their decision. It is, I think, apparent from the subject-matter with which the Convention deals and from its contents that the removal of these difficulties by means of a uniform international code, to be applied by the Courts of the various countries adopting the Convention, is one, at any rate, of the main objects at which the Convention aims; and it is in my judgment essential to approach it with a proper appreciation of this circumstance in mind.

The Convention is limited to "international carriage." There was no necessity for any agreement as to carriage performed within the territory of one State; nor was it thought necessary to deal with the case where an aeroplane performing the contract of carriage began and ended its journey in the territory of the same State without coming to earth, even if during its flight it passed over the territory of another State. In such a case difficulties as to the law applicable would not be likely to arise; in this country at any rate it could scarcely be said, for instance, that a contract to carry a passenger direct from London to Gibraltar without an intermediate landing (were such a flight possible) would be affected in any way by French law by reason of the fact that the machine in the course of its flight passed over French territory or made a forced landing therein. It was not considered useful to class as "international carriage" cases where the carriage begins in the territory of a State adopting the Convention and ends in one which does not adopt it or vice versa. The reason, I think, is that the Courts of the non-adopting State would not be bound by the Convention and there would accordingly be no possibility of uniformity of decision. The fact that in cases such as this the Convention does not apply is in my judgment no argument in favour of the view that the present case is not one of "international carriage."

On the other hand, where the contract of carriage provides for a descent in foreign territory, the fact that the carriage begins and ends in territory belonging to the same State would not necessarily prevent questions from arising in the Courts of that State as to the law applicable to that part of the flight which took place over the foreign territory in question. Accordingly the Convention makes express provision for this case. To take an example, any one who takes a ticket for a flight from Berlin to (say) Königsberg in East Prussia under terms of carriage providing for an intermediate descent upon Polish territory in the Corridor will know that his contract with the carrier will be held by German Courts to be governed by the Code and that no question of Polish law will arise ; and this would be so whether or not Poland was a party to the Convention. The reason for confining the application of the Convention where the carriage begins and ends in the territory of the same State to cases where descent in the territory of another State is provided for by the contract of carriage is sufficiently obvious. It is, I think, that where the descent in the territory of another State was involuntary, no question of the applicability of the law of that State to the contract of carriage would be likely to arise.

Bearing in mind these general considerations as to the manifest object of the Convention I turn to a closer examination of its more important terms. The definition of "international carriage" is contained in paras. 2 and 3 of art. 1. Para. 2 at the outset begins the definition by reference to the contract itself. This indeed is what would be expected seeing that the Convention lays down rules governing the terms and operation of contracts of carriage which will be enforced in the Courts of the High Contracting Parties. The rules are rules relating not to journeys, not to flights, not to parts of journeys, but to carriage performed under one (or in cases falling under para. 3 more than one) contract of carriage. The contract (or under para. 3 the series of contracts) is, so to speak, the unit to which attention is to be paid in considering whether the carriage to be performed under it is international or not.

It is next to be observed that the fact that there is a break in the carriage is immaterial. In other words, once the contract is ascertained to be a contract for the class of carriage described, it matters not that the journey is broken. Thus, if the contract were for carriage of a passenger from Paris to Madrid it would make no difference if the passenger was entitled under the contract to break his journey at Toulouse; he might be entitled to remain at Toulouse for a week or a month and then resume his journey, the carriage would none the less satisfy the definition. The reason for this is clear once it is appreciated that the contract is the unit, not the journey. Such a traveller, speaking without reference to the Convention, might well say, if asked by a fellow passenger on leaving Paris what his place of destination was, that it was Toulouse; but this would not alter the fact that his "place of destination" for the purposes of para. 2 of art. 1 would be Madrid, since it is to Madrid that the carrier agrees to carry him. The fact that the contract between the parties is the primary matter to be regarded is made even clearer when para. 3 is examined. Under this paragraph the conception of the contract as being what I have called the unit, is extended to include the case where there is a series of contracts, provided the parties have regarded the carriage as a "single operation." In that case, the series of contracts is treated as the unit and the justification for so doing lies in the fact that the parties have regarded the carriage to be performed thereunder as a single operation, a justification which has its basis in reason and good sense.

The controversy upon this part of the case turned more particularly on the meaning of two expressions in para. 2—namely, "the place of departure and the place of destination," and "an agreed stopping place." Before turning to the application of these expressions to the actual contract in this case it is useful to make some general observations as to their meaning.

1. "Place of departure and place of destination." The use of the singular in this expression indicates that in the minds of the parties to the Convention every contract of carriage has one place of departure and one place of

destination. An intermediate place at which the carriage may be broken is not regarded as a "place of destination." Having regard to its context, and particularly to the fact that it is in the contract that the place of departure and the place of destination are to be looked for, the meaning of the expression appears to me to be "the place at which the contractual carriage begins and the place at which the contractual carriage ends." It is useful to test this construction by one or two examples. If the contract with the carrier provides that the passenger shall be carried on a voyage from Berlin to Königsberg in East Prussia with a right to break the journey at some point of descent in the Polish Corridor, the contractual carriage begins at Berlin and ends at Königsberg. Similarly, if the contract is for a voyage from Berlin to Hamburg with a similar break in the Polish Corridor, the contractual carriage begins at Berlin and ends at Hamburg. If the contract is for a circular voyage, starting at Berlin, visiting various European capitals and ending at Berlin, the contractual carriage begins at Berlin and ends at Berlin. In this connection it is not unimportant to observe that art. 31, para. 1, provides that in the case of combined carriage performed partly by air and partly by any other mode of carriage the provisions of the Convention apply only to the carriage by air. For the purpose therefore of ascertaining what are the place of departure and the place of destination carriage by motor-car or train from the city to the aerodrome is to be disregarded—one aerodrome is the place of departure and the other aerodrome is the place of destination. It follows from this that just as in the Berlin–Hamburg example given above, Berlin is the place of departure and Hamburg is the place of destination, so if the contract is to carry the passenger from one aerodrome outside Berlin to a place in the Polish Corridor and back to another aerodrome outside Berlin, the former aerodrome is the place of departure and the latter the place of destination.

In all these cases the same reason for the application of an international code exists. The desirability of excluding considerations of different systems of law and any possible

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conflict between them exists just as much in the cases Berlin–Corridor–Hamburg, Berlin–tour of European capitals–Berlin, 1st Berlin aerodrome–Corridor–2nd Berlin aerodrome, as it does in the case Berlin–Corridor–Königsberg. In each case, when regard is had to the carriage which the carrier by his contract agrees to perform, the place where the contractual carriage begins and the place where it ends are clear beyond possibility of doubt.

2. "Agreed stopping place." I have already referred to the significance which in my opinion is to be attached to the word "agreed." The expression "stopping place" cannot in my judgment be confined to cases where the aeroplane descends without any right in the passenger to break his journey. If two passengers leave Berlin in an aeroplane bound for Königsberg, the contract providing for a descent of the machine in the Polish Corridor, and one of the passengers is and the other is not entitled to break his journey in the Corridor, it cannot be that the carriage is international in the case of the latter and not in the case of the former. In each case the Corridor is an agreed stopping place although the rights of the two passengers in relation to it are different. If I am right in thinking that the expression "place of departure and place of destination" means the place at which the contractual carriage begins and the place at which it ends, "agreed stopping place" means a place where according to the contract the machine by which the contract is to be performed will stop in the course of performing the contractual carriage, whatever the purpose of the descent may be and whatever rights the passenger may have to break his journey at that place. This interpretation of the expression "agreed stopping place" is one which gives full effect to what I have described as the real object of the Convention. If the High Contracting Parties intended to exclude the possible application to the contract of the law of a country in which by the contract a descent is to take place, their intention would fall short of fulfilment if a distinction were to be drawn based on the reasons for the descent or the right of the passenger to

break his journey, matters which are quite irrelevant in that connection.

Stress was laid on the fact that by art. 3, para. 1 (*c*), the carrier may reserve the right to alter the stopping places in case of necessity; and it was suggested that this provision would make it wrong, e.g., to treat Brussels as an agreed stopping place in the case of a return ticket from London to Brussels since a right in the carrier to substitute some other place, e.g., Antwerp for Brussels, would be inconsistent with the contract. But this argument in my judgment goes too far. The same argument would apply in the case of the carriage Berlin–Corridor–Königsberg where the passenger has the right to break his journey at the agreed stopping place in the Corridor. The fact that in such a case the carrier reserved the right to stop at some place in the Corridor other than that stated in the contract would not in my judgment affect the matter one way or another. Moreover, the provision referred to is optional only; and if the carrier does not in the contract reserve the right to alter the agreed stopping place at which the passenger is to be entitled to break the carriage, the contract is broken if he stops not there, but at some other place.

The conclusion to which I have come is that the contract by reference to which the place of departure and the place of destination are to be ascertained may be any contract of carriage whether for a single journey, for a circular journey or for a return journey; that the place of departure and the place of destination mean the places at which under the particular contract in question the contractual carriage begins and ends; and that agreed stopping place means any place at which under the particular contract the aeroplane is to descend in foreign territory between the points of departure and destination. In the case of a return journey this will be or include, as the case may be, the place out to and back from which by the contract the passenger is to be carried. In the case of carriage of each type the same essential element is present—namely, the interposition between the beginning and the end of the contractual carriage of an agreed descent in the territory of another State. In each case the mischief requiring to be remedied by the adoption of an international code is the same—namely, the possibility of questions arising between the parties as to the law applicable to the contract which they have made. I cannot find any consistently intelligible meanings for the expressions which I have been discussing which stop short of those which I have placed upon them.

It is said that the expression "place of destination" is not a natural expression to use in reference to the homeward end of a return journey; and that agreed stopping place is not a natural expression to use in reference to the outward end of such a journey. But the question is not what is the natural meaning of these expressions in the abstract or in some other context but what is their natural meaning in this context. If my analysis of the context is correct I see nothing unnatural in the meaning which I have attributed to these expressions.

It must next be considered whether the contract in this case falls within the paragraph in question as I have construed it. In my opinion the contract is one contract, not two, and is a contract for the journey to Antwerp and back. I attribute no importance to the fact that the ticket is made up of two sheets of paper; nor to the fact that at the bottom of Parts A and B respectively on each sheet the words "For Airport of Departure" and "For Airport of Destination" are printed. These are nothing more than indications to the passenger and directions to the officers of the company as to the points at which the parts in question are to be detached. They have no reference to the Convention; and even if they had they could not affect the question whether or not the contract is one covered by the Convention. Once the contract is found to be covered by the Convention, what for the purposes of the Convention would be a misdescription in the ticket cannot affect the matter one way or the other. Nor do I attach any importance to the fact that in Part B of the outward part of the ticket (and probably also in Part B of the homeward part) the space for "Agreed Stopping

Places" has inserted in it "as per Company's timetable." If I am right in thinking, as I do, that for the purpose of a return ticket the outward end of the journey is an agreed stopping place within the meaning of the Convention, no misstatement or misdescription in the ticket can affect the matter. Indeed, the Convention itself so provides—see art. 3, para. 2.

The main argument upon the contract of carriage in this case was to the effect that it was a contract for two carriages, one out and one home. With all respect to those who think otherwise I find difficulty in appreciating this argument. If the contract is one contract (which, for the purposes of the argument, is assumed) I do not see how it carries the argument further to describe the contractual carriage for which it provides as "two carriages." It appears to me equally accurate to say that it is a contract for one carriage divided into two stages. But here again the question is not "is the contract a contract for two carriages" in some abstract sense—it is "is the contract a contract for two carriages for the purposes of the Convention," which is a very different thing. There is nothing in the language of the Convention to suggest that, once the parties have made a single contract for a carriage with a place of departure and a place of destination, the carriage contracted for will fall outside the Convention merely because the parties have chosen to express their contract in language suggesting that in some abstract sense it is a contract for two carriages. Here again the answer to the argument is in my judgment to be found in the fact that the contract of carriage is the unit to be regarded.

In support of the argument reliance was placed upon the fact that in the ticket itself two sums are inserted as fares, one of 4*l.* for the outward journey and one of 2*l.* 8*s.* for the homeward journey. I cannot myself see how this circumstance can convert the contractual carriage into two carriages for the purpose of the Convention. If a passenger entered into a contract for carriage by air from London to Cologne with an agreed stopping place at Brussels—Germany being and Belgium not being a ratifying party to the Convention for the purposes of this illustration—I cannot see how it could be said that the whole of the contractual carriage fell outside the Convention, merely because the ticket delivered to the passenger happened to be in two sections on one of which was inserted the advertised fare from London to Brussels, and in the other of which was inserted the advertised fare from Brussels to Cologne. Yet upon the assumption made as to ratification this would be the result of the argument. In fact, if I have rightly construed the Convention, there is no room for such an artificial splitting of the contractual carriage.

In the present case the object for which the two sums were inserted in the ticket is to my mind clear. Having regard to the terms of the document described as " European Timetable," a passenger holding a return ticket is entitled (under clause 6 on p. 2) to a refund of the difference between the single and the return fare in certain events. This right is in my judgment part of the contract between the parties, and whether it be regarded as part of the actual contract of carriage itself or as a contemporaneous collateral agreement it may in my opinion be looked at for the purpose of ascertaining what contractual effect, if any, is to be given to the separation of the fares which appears on the face of the ticket. On this basis it appears to me impossible to construe the ticket as anything but a " return ticket," or to treat the separation of the fares as anything more than a convenient arrangement for the purpose of enabling the passenger's right to a refund to be carried into effect in a practical way. Although upon the question of construction it is probably not a matter which can be legitimately taken into account, it is consoling to observe that this conclusion avoids a result which would place the company in the position of handing to its passengers tickets conferring rights different to those which it offers in the Time-table. That document offers to the intending passenger a return ticket. If I am right in thinking that a return ticket falls within the Convention and if the splitting of the fare upon the face of the ticket is sufficient to take it out of the Convention by converting the contractual carriage into two carriages instead of one, then the ticket which the company hands to the passenger is not the ticket which in its Time-table it offers to give.

In the result I have come to the conclusion that the liability of the defendants is limited to the sterling equivalent of a sum of 125,000*f.* by art. 22 (1.) of the Convention and that this amount only should be awarded, it being divided between the plaintiffs in the proportions mentioned in the judgment of Lewis J.

But upon the assumption that this conclusion is not correct I must state my views upon the second point which arises in the appeal. If the contract is not a contract of "international carriage" within the meaning of the Convention, it is a contract governed by the terms of the International Air Traffic Association Agreement. In so far as this agreement deals with carriage—which, although for some reason (e.g., non-ratification) it does not fall within the Convention, has nevertheless, what, for short, I may call, an international element—one of its manifest objects is to lay down a contractual code the effect of which will be to exclude the application of the laws of different countries and to substitute for them one universal code. In this respect the objects of the Agreement resemble those of the Convention which I have already discussed.

The argument of the respondent may be summarized as follows: (1.) Under the contract there is an implied duty on the carrier to take care; (2.) breach of this duty is an "act neglect or default" on the part of the carrier within the meaning of s. 1 of Lord Campbell's Act; (3.) the limitation of liability to 125,000*f.* laid down by art. 19, para. 2 (1.), of the International Air Traffic Association Agreement is not binding upon the representatives of a deceased passenger in an action under Lord Campbell's Act: see *Nunan* v. *Southern Ry. Co.* (1), a decision which is binding on this Court.

I am unable to agree with the first of these propositions. If there is under the contract an implied obligation on the

(1) [1924] 1 K. B. 223.

carrier to take care it must be an obligation arising under the law of some country. In the case of carriage with an international element this at once opens the door to questions as to what law is to be considered for the purpose of ascertaining the extent of the duty, if any, questions which may well be answered in different ways with different results according as they arise in the Courts of one country or another. In the case of journeys from London to Brussels, or vice versa, the passenger may find himself travelling in a Belgian or a British machine according to the day of the week on which he travels. It may very well be that if he takes a ticket in London and the machine by which he travels is a Belgian machine the law held to be applicable to the contract by an English or a Belgian Court would be the law of Belgium by reference to which, upon the argument, the standard of duty would fall to be judged. On the other hand, if the machine was a British machine an English Court would presumably hold that English law was applicable, although if, e.g., the passenger was a Belgian and the accident took place in Belgium it does not follow that a Belgian Court would necessarily take the same view. In the case of a return ticket the possibility of doubts and differences arising, particularly when the aeroplanes on the outward and homeward journeys belong to different nationalities, are even greater. So in the case of long journeys different stages of which are performed by machines belonging to different countries. Now, of course, these considerations do not justify a strained interpretation of the language of the contract. But it is in my opinion legitimate to bear in mind what upon the face of the International Air Traffic Association Agreement appears to be one of its main objects in considering what construction ought to be placed upon the language which it contains. When that language is considered it does in my judgment effect this object. Para. 5 of art. 18 states in perfectly clear terms as a condition of the contract that " except in so far as liability is *expressly* provided for in these Conditions of Carriage no liability whatsoever is accepted by the carriers " and " the passenger renounces for himself and his representatives all claims for compensation for damage in connection with the carriage . . . . whatever may be the legal grounds upon which any claim concerning any such liability may be based." I have italicized the word "expressly" since it is in my judgment of great importance. The express provisions referred to are set out in art. 19. Under that Article a liability is imposed upon the carrier not, as I construe it, to exercise care in performing the contract of carriage, but to pay a sum up to the limit specified if a passenger is killed or injured during the period of the carriage, unless he can escape this liability under clause (3.) of para. 1 of art. 19. In other words, those responsible for framing the International Air Traffic Association Agreement adopted in my opinion the very sensible and convenient course of eliminating from the contract all considerations of a duty to take care, which might vary according to the law applicable to any individual case, and substituted for it what may be described as a modified system of insurance, under which carriers who kill or injure passengers are bound to make compensation unless they can prove that they have "taken all necessary measures to avoid the damage or that it was impossible for them to take such measures." It cannot be said that the imposition of the burden of proof upon the carrier is an inadequate compensation for the surrender by the passenger of his right to base a claim upon some implied duty to take care. Para. 4 (1.) of art. 22 does not in my opinion cut down the clear effect of the paragraphs to which I have referred. I should add that it was not seriously argued that para. 5 of art. 18 was not sufficient to exclude any liability in tort.

If my view upon this point is correct, the result will be that the plaintiffs are not entitled to recover anything since, if the contract is to pay money in the event of the death of the passenger unless certain facts are proved, it is not the breach of that contract which causes the death within the meaning of s. 1 of Lord Campbell's Act. Upon the view which I take of the contract the questions raised by the second and third propositions do not arise, but I will shortly state my views upon them.

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The second proposition raises a question of novelty and it is not an easy one. It is said in answer to it that the act neglect or default dealt with by Lord Campbell's Act must be a tortious act, and that if the death was due merely to a breach of contract the Act does not apply. In the ordinary case arising under Lord Campbell's Act where there has been a contract of carriage the question is really an academic one, and this no doubt explains the fact that there is not, as it appears, any authority upon the point. In such a case in addition to the breach of contract there is a tortious act neglect or default. But in the present case, having regard to the terms of the contract, liability ex delicto is excluded; and if, contrary to my view, there be an obligation to perform the carriage with due care it is contractual only. The question, therefore, is, is a breach of contract causing death an act neglect or default which causes death within the meaning of s. 1 of the Act? With some hesitation I answer this question in the affirmative. The word "default" is a word of wide signification and in its ordinary use does, I think, include a breach of contract.

The third proposition is based on *Nunan's* case. (1) That was a case where the contract did not exclude liability ex delicto, it merely limited the company's liability. In other words the limitation of liability was by contract superimposed upon an existing duty to take care which, independently of the contract, arose from the fact that the company accepted the passenger. In the present case the contract excludes liability ex delicto and the liability is a liability ex contractu only which comes into existence with the limitation on the amount recoverable annexed to it. This distinction is, I think, too fine to enable me to say that *Nunan's* case (1) does not apply.

I have thought it right to express at length my views on the questions with which I have dealt, not only because they are questions of great difficulty and importance, but because the views which I have formed are in important respects different from those expressed by the learned judge

(1) [1924] 1 K. B. 223.

and by Greer L.J., whose judgment I have had the advantage of reading. I do not propose to burden this judgment by examining the facts, and I need only say that I am in entire agreement with the conclusions expressed by the learned judge in his most careful judgment, and with those of Greer L.J. upon this branch of the case. I am also in agreement with their conclusions upon the question of damages.

TALBOT J. The chief material facts have been fully stated, and there is no need to repeat them. Nor is it necessary for me to dwell on the difficulty of some of the questions involved. The difference of opinion among the judges who have considered them is sufficient proof of it. Nor do I need to do more than state the embarrassment which it is to me to have to give what (so far as this Court is concerned) is the deciding voice between the two judgments which have been read, so far as they differ.

Among these points of difference it seems natural to consider first the interpretation to be given to the expression "international carriage" in the Convention signed on behalf of the British Government on October 12, 1929. The Convention has, by the Carriage by Air Act, 1932, s. 1, sub-s. 1, the force of law in the United Kingdom, in relation to any carriage by air to which the Convention applies, so far as it relates to rights and liabilities of carriers and passengers, whatever be the nationality of the aircraft performing the carriage. It is set out (in English) in Sch. I. of the Act; and by art. 1 (1.) it applies (amongst other things) to all "international carriage" of persons performed by aircraft for reward. Art. 1 (2.) states the meaning of "international carriage" for the purposes of the Convention. I need not read the whole paragraph again. To be "international carriage," the carriage must, according to the contract made between the parties, have a place of departure and a place of destination, either situated within the territories of two of the High Contracting Parties to the Convention, or, if they are both within the territory of one High Contracting Party, having an "agreed stopping place," "within a territory subject to the sovereignty,

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suzerainty, mandate or authority of another Power," whether that Power is, or is not, a party to the Convention. (Compare the corresponding words in the General Conditions published by the International Air Traffic Association, IA, art. I, para. 2 (2.))

There was some confusion in the Court below, caused no doubt partly by the destruction of material documents by the fire of December 30, 1933, as to the exact nature of the contract under which Mr. Grein was travelling at the time of his death. I take the facts now established as being these, shortly stated: Mr. Grein on December 15, 1933, procured at an office of Thos. Cook & Son, Ld., in the City of London, a paper (described as a "voucher") headed with the defendants' name, by which Cook & Son requested the booking clerk at the defendants' head office at Victoria Station to give "Bearer Mr. J. T. Grein" "One 15 day return ticket to Antwerp via Brussels valid for 23rd December 1933." The amount of the fare (6*l.* 8*s.*) is stated on the voucher as paid: it was the advertised price of a 15 day return ticket to Antwerp. It is to be noticed that the expression "return ticket," familiar to English travellers, is used in this document without explanation, and appears without any special definition in other documents used in connection with the defendants' system, e.g., the General Conditions published by the International Air Traffic Association already mentioned, p. 6, art. 2, para. 5, art. 4; European Time-table, p. 2, para. (6), pp. 5, 6, 7.

On the following day, December 16, Mr. Grein received at Victoria in exchange for the voucher a ticket in three parts (one of which could not be produced at the trial, having presumably been destroyed in the fire which overtook the aeroplane). Extracts from the General Conditions mentioned above appear on the cover of the ticket. The first of them states that the contract of carriage is subject to the General Conditions.

It seems to me that this was one contract, made at one time and place, conferring a right to be conveyed, on the conditions stated in it, from London to Antwerp and back, via Brussels, and that this is correctly described as a contract and a carriage representing a journey of which London is place both of departure and destination; and one therefore which a stop at an agreed stopping place in Belgium makes international carriage. No doubt to say that a carriage or a contract for carriage is from London to London is not an ordinary way of speaking, but it is what this contract and carriage in fact were; and I see no reason why the definition in art. 1 (2.) of the Convention does not apply. There is departure from London and destination to London, both in the territory of one High Contracting Party; and there is an agreed stopping place (or more than one) in foreign territory. I agree with Greene L.J. that there is no reason at all for not applying the words "agreed stopping place" to the most distant point of the total journey for which the contract provides.

The words of the definition in my opinion apply, and all the qualities embodied in it would be included in what would ordinarily be called international carriage. I refer again to the description in the General Conditions of "special categories of international carriage" (in art. 1, para. 2 (2.)).

I may add that I find this opinion, which I formed before I had the opportunity of reading the judgments of the other members of the Court, on the construction of art. 1 (2.) of the Convention taken by itself, strongly supported by the exposition of the objects and scope of the Convention with which Greene L.J. has prefaced his judgment.

The effect of this is (see s. 1, sub-s. 4, of the Act of 1932) to make Lord Campbell's Act inapplicable to the disaster which is the subject of this action, and to substitute for its provisions for this purpose those of art. 17 of Sch. I., and those of Sch. II., of the Act of 1932. In the circumstances of this case it was only necessary for the plaintiff under art. 17 of Sch. I. and Sch. II. to prove the necessary facts of the accident; that Mr. J. T. Grein's death resulted; and the kinship between him and those for whose benefit the action was brought. None of the defences allowed by the Convention are proved; but the liability is limited by art. 22 (1.) to 125,000*f*. (see s. 1, sub-s. 5, of the Carriage by Air Act, 1932):

the plaintiff is therefore entitled to judgment for the equivalent of that sum, to be divided in the proportions ordered by the judgment of Lewis J.

I have had the opportunity of considering the two full judgments which have been read; and the result is that I agree, on all the material points of difference, with Greene L.J. and with his conclusions, both as to the actual decision and in the various alternatives which he has mentioned. I agree in the decisions of fact on which the Lords Justices have expressed their agreement with Lewis J., and also as to the damages, if Lord Campbell's Act applied to the case.

Appeal allowed.

Solicitors for appellants: *Beaumont & Son.*

Solicitors for respondent: *Wordsworth, Marr, Johnson & Shaw.*

J. S. H.

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CHURCHILL & SIM *v.* GODDARD.

[1935. C. 563.]

Principal and agent—Sale of goods—Foreign seller—Sale through del credere agents—Bills drawn by agents and accepted by buyer—Shipping documents handed to buyer—Sellers previously paid by agents—Rejection of goods by buyer—Objection upheld by arbitrator—Dishonour of bills by buyer—Action by agents on bills—Agents held not agents for sellers in bill transaction with buyer—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 2, 27, *sub-s.* 1; *s.* 30, *sub-s.* 1; *s.* 38, *sub-s.* 1; *s.* 54, *sub-s.* 1.

Appellants, as the *del credere* agents of R., a Finnish timber exporter, assumed the responsibility for the discharge by the buyers of timber of their contractual obligations to R. and received in consequence a comparatively high rate of commission. Under the practice R. forwarded the shipping documents to the appellants, who then paid to their principal R. the invoice price less their commission. The contract of sale provided that the buyer, the respondent, if he wanted the usual trade credit terms, must give an approved acceptance, whether drawn by the seller or his authorized agent. The appellants having received the shipping documents from R. on October 12, 1934, sent to the respondent on October 22, 1934, for acceptance their own two drafts payable to the drawer's order, together with the shipping documents, thus tacitly " approving " his name. On October 23 the appellants paid the net invoice price to the seller's bank and on October 26 the respondent returned the drafts duly accepted. The respondent rejected the goods on November 3—rightly, as it subsequently turned out, after arbitration—and informed the appellants, stating he held the shipping documents to their order. On February 11, 1935, he dishonoured his acceptances on presentation, and on February 14 the appellants issued a specially indorsed writ against him.

The respondent claimed that the appellants were acting in the bill of exchange transaction merely as agents and trustees for the seller. Therefore, that there was no contract made by the bill of exchange transaction between the appellants as drawers and the respondent as acceptor. If, however, there was a contract to which the appellants were parties in their own right, that there was no consideration for it or that the consideration failed.

Branson J. held that there was no new contract effected by the bill of exchange transaction :—

Held, that the appellants were in no sense trustees or agents for R. when they sought to recover on the bills : the appellants were payees as well as drawers and were therefore holders within s. 2 of the Bills of Exchange Act, 1882, and sued as holders for value under s. 38, sub-s. 1, and s. 27, sub-s. 1, of that Act. The respondent was liable under s. 54, sub-s. 1. Value was to be presumed in the appellants' favour (s. 30, sub-s. 1), and the respondent gave no evidence to disprove it and the bills themselves expressly stated the consideration in the words " value received in wood-goods per s.s. *Sonja.*"

A decision contrary to the above would, in practice, make *del credere* agents responsible also to the buyers for the due performance of contracts on the part of sellers.

Decision of Branson J. reversed.

APPEAL of the plaintiffs from a judgment of Branson J. in favour of the defendant.

The action was heard in the Commercial List and was brought in respect of two bills of exchange dated October 8, 1934, of which the plaintiffs were drawers and the defendant was acceptor. The amount of the claim with interest was 2558*l.* 11*s.* 1*d.*

The following statement of facts is taken from the judgment of Lord Roche :—

" The plaintiffs are timber brokers carrying on business in London and Liverpool. The defendant is a timber importer and merchant at Liverpool. At all material times the plaintiffs were sole agents in the United Kingdom for a number of Finnish timber exporters including Messrs. Raahe O/Y, whom I refer to hereafter as Raahes. The terms of the agency were defined by a letter dated November 28, 1932, which provided that the plaintiffs should stand full 100 per cent. *del credere* for all sales closed through them and that payment for complete deliveries should be made in cash against shipping documents, with the agreed deduction for commission, and shippers had the right to draw upon the plaintiffs through a bank at three days' sight or to send the plaintiffs shipping documents direct, whereupon the plaintiffs were to pay the net invoice amounts within three days to the shippers' bank.

"In March, 1934, the plaintiffs, as agents for Raahes, negotiated the sale from Raahes to the defendant of a quantity of wood-goods to be shipped from Haukipudas between June and September, 1934. Two contracts dated respectively March 20 and 22, 1934, were drawn up by the plaintiffs in respect of these sales and were signed by the plaintiffs as brokers. The parties to the contracts were expressed to be Raahes as sellers and the defendant as buyer. The contracts were in f.o.b. form, contained specifications and various conditions and amongst such conditions the following: '(1.) The prices to be free alongside ship. (4.) Shiproom to be provided by buyers. (11.) Payment to be made on receipt of and in exchange for shipping documents by approved acceptances of sellers' or authorized agents' drafts payable in London at four months from the date of bill of lading, or at buyers option in cash less 2½ per cent. discount at three days' sight payable in London. Sellers to give notice of vessel's arrival by telegraph, and buyers option as to mode of payment to be declared on receipt of such notice. (13.) Property in goods to be deemed for all purposes except retention of vendor's lien for unpaid purchase price to have passed to buyers when goods have been put on board. (17.) Disputes to be settled by arbitration in England. Buyers not to reject the goods specified in the contracts but to accept and pay for them in terms of contract against shipping documents.'

"In October, 1934, the steamship *Sonja* loaded 240 standards of wood-goods under the above mentioned contracts and the defendant was duly advised by the plaintiffs on October 8. There was an interval before the defendant declared his option as to payment because a question arose as to the quantity shipped, and on October 22 this was settled by the plaintiffs on behalf of Raahes on the basis of an allowance of 16*l.* for variation in quantity.

"On October 26 the defendant returned to the plaintiffs the two drafts now put in suit accepted by him, having previously declared his option to pay in that manner and having received and retained the shipping documents for the *Sonja's* cargo. Meanwhile the plaintiffs had on October 23, in accordance with the terms of their agreement with Raahes, paid Raahes 2415*l.* 19*s.* 3*d.*, being the full amount of the *Sonja* invoices less agreed deductions and the allowance of 16*l.* When the plaintiffs received the defendant's acceptances to which they looked for reimbursement of their payment to Raahes they, on November 5, discounted them with and endorsed them to bankers; but no question arises as to the right of these endorsees, as when the dispute, which had by this time arisen as to the quality of the goods, culminated in the defendant refusing or intimating that he would refuse payment of the drafts, the plaintiffs as drawers took up the bills. The dispute as to quality developed and the defendant claimed to reject the cargo on the ground that it was not as specified. The bills were then dishonoured, and the writ in this action was issued on February 14, 1935. By arrangement the goods were sold on behalf of whom it might concern, and there was a considerable deficiency upon the realization. The matter then went to an arbitration, which was in progress when the matter came before the trial judge. The arbitration was, of course, between the parties to the sale contracts.

"On April 17 an order was made in the action that the issue to be tried be limited to the question of the liability, if any, of the defendant on the bills, assuming for the purposes of this action that the defendant had a right to reject or to counterclaim as against the sellers under the arbitration then proceeding between the defendant and the sellers. The case was argued on that assumption upon the documents in the case and without further evidence, and on May 17 the learned judge decided in favour of the defendant for a reason which I will discuss later. Notice of appeal was given, and when the matter first came before this Court, in order to avoid further debate and decision upon a hypothetical basis, the Court directed that the appeal should stand over until the arbitration was decided. On June 12, 1935, an award was made in the form of a special case which raised the question, amongst others, of the defendant's right to reject the cargo. The special case was argued before Lewis J. on November 16 and 20, and he decided that the defendant had a right to reject because the goods were not as specified: see *Goddard* v. *Raahe O/Y Osakeyhtio*. (1) The parties to this action agreed that the award in the *Goddard* v. *Raahe* arbitration (1) might be referred to on this appeal as evidence of the facts therein referred to."

On February 14, 1935, the plaintiffs issued the writ in the action claiming against the defendant as acceptor of the two bills. The defendant in his defence pleaded that there was no consideration for the acceptance of the bills, or, alternatively, that there had been failure of consideration; that the plaintiffs had always held the bills without consideration; that the timber tendered was not in accordance with the contract; that he was entitled to and did reject it; that the plaintiffs acted throughout merely as agents for Raahes and were suing as trustees or agents for Raahes; and, finally, that if the arbitrator reduced the price payable for the timber he was entitled to counterclaim the amount of such reduction. He also pleaded that the plaintiffs at all material times had notice of the matters aforesaid.

The plaintiffs put in a reply and defence to the counterclaim. They said that in making the two contracts for the sale of timber to the defendant they were acting as *del credere* agents of Raahe Osakeyhtio, and they had, in accordance with their ordinary course of business, paid Raahe Osakeyhtio the purchase price less their commission. They denied that they were suing as trustees or agents of Raahe Osakeyhtio, or for that firm's benefit. The defendant had accepted the bills of exchange for the shipping documents and had retained those documents, and he must therefore be liable on the bills and could not set up breach of contract by another party.

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(1) (1935) 53 Ll. L. R. 208.

The form of one of the bills was as follows: " Four months after date pay this sole bill of exchange to our order one thousand three hundred and twenty-nine pounds two shillings and nine pence: value received in wood-goods per s.s. *Sonja.*

" Churchill and Sim.

" To H. Goddard, Esq., Liverpool.
" Payable in London."

Endorsed on back.

" Pay Comptoir National d'Escompte de Paris, or order."

The other bill was identical in form except as to the amount stated to be payable.

Branson J. held that what was done was carried out under the existing contract of purchase and sale, that the acceptance of the bills by the defendant in exchange for shipping documents did not constitute a new contract between the plaintiffs and the defendant, and that, on the assumption that the defendant was entitled to reject, the defendant could avail himself of such rights against the plaintiffs as they were only given the acceptances as agents for the sellers. He therefore gave judgment in favour of the defendant on the issue.

The plaintiffs appealed. The appeal was heard on February 27 and 28, 1936.

F. J. Tucker K.C. and *Hon. H. L. Parker* for the appellants. The appellants did not draw or receive the accepted bills as agents for the sellers. They have paid the sellers and are not liable to account. The appellants were designated as principals when the bills were accepted by the respondent. By drawing the bills they created no new relationship between the sellers and buyer. That being so, the onus is on the respondent to show that there was a total failure of consideration and that they have failed to do. The consideration was the shipping documents or possibly the shipment of wood-goods per s.s. *Sonja* as appeared on the form of the bills, so that the receipt for any woods per s.s. *Sonja* would be sufficient.

[SCOTT L.J. Would that be so if the goods were not according to contract ?]

Yes, because the bills stood without regard to anything contained in the contract. However, it is preferred to say that the shipping documents were the consideration. That view receives support from *Barton Thompson & Co.* v. *Vigers Brothers* (1), although Pickford J. took a different view in *Jordeson & Co. & Kahn* v. *London Hardwood Co.* (2) In *Flatau, Dick & Co.* v. *Keeping* (3) different considerations arose, but the above two cases were considered and the decision in *Barton Thompson & Co.* v. *Vigers Brothers* (1) was approved.

[LORD ROCHE. None of these cases conclude the matter in the present case, where there has been an acceptance. It is necessary to consider the statute.]

By the Bills of Exchange Act, 1882, the holder of a bill may sue on it in his own name. Further, when the title is defective the holder in due course gets a good title. When, however, a holder sues wholly for the benefit of some other person the defendant is entitled to rely on any defence against that other person. That, however, has no application here. By s. 30, sub-s. 1, every party whose signature appears on a bill is prima facie deemed to have become party thereto for value. By s. 27, sub-s. 1, valuable consideration may be constituted by any consideration sufficient to support a simple contract, and by sub-s. 2 where value has at any time been given for the bill the holder is deemed to be a holder for value as regards the acceptor. By the definition of " holder " in s. 2 it includes the payee of a bill. Further, by s. 54 the acceptor of a bill engages to pay it according to the tenor of the acceptance. The plaintiffs are drawers and payees while the defendant is acceptor of the bills and therefore the defendant is prima facie liable on the bills unless he can show failure of consideration, and consideration, as already argued, is provided by the shipping documents.

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(1) (1906) 19 Com. Cas. 175. (2) (1913) 19 Com. Cas. 161.
(3) (1931) 36 Com. Cas. 243.

[LORD ROCHE. As between the parties to the bills can the rights or liabilities of other persons affect the liability of the acceptor ?]

In *Thornton* v. *Maynard* (1) the plea was raised that the holder is in part only a trustee for the drawer's agent when the acceptor had a set-off, and the claim succeeded. In *Cochrane* v. *Green* (2) an equitable set-off of a sum due from the plaintiff to a trustee for the defendant was allowed. That is not a case relating to a bill of exchange.

[LORD ROCHE. It would seem to follow that if the defendant here could say that the plaintiffs were trustees for some one else of the subject-matter of the bills against whom the defendant had a good equitable claim he would be entitled to rely on it against the plaintiffs.]

Bechervaise v. *Lewis* (3) is the nearest case to that. Here, however, no such relationship exists between the plaintiffs and the sellers. But supposing the plaintiffs could be treated as agents for the sellers, still they would have a lien on the bills as against the sellers because they have paid the sellers the purchase-money, and to that extent they would be entitled to rank as holders for value against the defendant as acceptor to the extent of the lien : see s. 27, sub-s. 3, of the Act of 1882.

A. T. Miller K.C. and *R. E. Gething* for the respondent. The real question here is whether buyers who have properly refused to accept goods shipped to them are bound to pay the shippers' authorized agents the amount of bills accepted in payment for the goods. In such a case there is a failure of consideration. It is to be noted that the claim here is by the drawers of the bills against the acceptors, so that the immediate parties are alone concerned. It is not contended that the bills did not contain a contract by the acceptor to pay the drawers, but the bills have not been negotiated and passed into the hands of third parties for value. It makes no difference that the bills had been discounted with the Comptoir d'Escompte, as the drawers got them back : see

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(1) (1875) L. R. 10 C. P. 695.
(2) (1860) 9 C. B. (N. S.) 448.
(3) (1872) L. R. 7 C. P. 372.

s. 59, sub-s. 2 (*b*). Here the facts are that the plaintiffs arranged to become sole agents for the sellers and undertook if the sellers sent the shipping documents to them to pay the purchase price due. But this fact has nothing to do with the buyer, and on the shippers sending goods which did not accord with the contract and were refused, the plaintiffs' position was affected. The plaintiffs were not merely agents to draft bills but also to effect sales, and therefore they are affected by the rejection of the goods and cannot recover on the bills.

In any case there was a total failure of consideration and the plaintiffs cannot therefore recover on the bills: see *Wells* v. *Hopkins* (1) and *Solly* v. *Hinde.* (2) There is nothing to preclude the defendant from saying that there is no consideration for the bills.

[LORD ROCHE. That is not disputed. What is disputed is that the rightful rejection of the goods put an end to the consideration. Also might it not be said that the plaintiffs are holders ?]

They are not holders for value. Further, a holder in due course must under s. 29, sub-s. 1 (*b*), have taken the bill in good faith as well as for value. Here at the time the drawers took back the bills from the discounters they were aware of the difficulty that had arisen. Failure of consideration has the same effect as if the consideration had always been absent: Byles on Bills of Exchange, 19th ed., p. 143.

[They also referred to *Agra and Masterman's Bank, Ld.* v. *Leighton* (3) ; *Flatau, Dick & Co.* v. *Keeping* (4) ; *Bramwell* v. *Spiller* (5) ; *Abbott* v. *Hendricks.* (6)]

[LORD ROCHE referred to *Cox* v. *Prentice.* (7)]

Tucker K.C. replied.

Cur. adv. vult.

March 18. The following judgments were read :—

LORD ROCHE [stated the facts as above set out and continued :] It is right to all parties concerned, including

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(1) (1839) 5 M. & W. 7.
(2) (1834) 2 Cr. & M. 516.
(3) (1866) L. R. 2 Ex. 56.
(4) 36 Com. Cas. 243.
(5) (1870) 21 L. T. 672.
(6) (1840) 1 Man. & Gr. 791.
(7) (1815) 3 M. & S. 344.

Raahes, to say that the controversies and proceedings to which I have referred raised no question as to the will or ability of either the defendant or Raahes to meet any obligations they might be found to be under, and on the hearing of this appeal both sides wished it to be understood that Raahes would undoubtedly meet their obligations under the award, and that the question was one of principle and of importance—namely, upon whom did the burden fall of arranging a final adjustment with and payment by the sellers in circumstances such as exist here. If the buyer were entitled to refuse payment of the bills, that burden would fall upon the agents. The business convenience of this result to the defendant and to other timber importers in similar cases is obvious. Naturally, however, the plaintiffs desire to maintain the rights they conceive they have as holders of bills of exchange, and to escape from a conclusion which would in practice make *del credere* agents who are already responsible to the sellers for payment by the buyers also responsible to the buyers for due performance of contracts on the part of the sellers.

I can now pass to a consideration of the judgment under appeal. The learned judge stated the contention of the defendant upon which, as I read his judgment, he decided in his favour as a contention "that the plaintiffs acted throughout merely as agents for Raahes and are suing as trustees or agents for Raahes." He did not expressly observe upon the fact that in the defence, after the grounds justifying rejection and giving rise to failure of consideration had been pleaded, it was alleged in para. 6 that the plaintiffs at all material times had notice of the matters aforesaid. The defendant supplied no evidence of such notice, and indeed it is plain that there was no such notice, and that when the plaintiffs parted with the shipping documents and when they paid Raahes on October 23 they had no reason to suppose but that everything was in order with the shipment, apart from the question already settled by an allowance. Several cases were cited to the judge as showing the history of similar dealings over a number of years and as showing how well known to the trade was the course of business by which brokers acted *del credere* and paid the sellers before the buyers paid them. In the cases cited agents, such as the plaintiffs, who had paid the sellers but had not obtained acceptances from the buyers, sought to maintain a claim against buyers for the price of goods or for the return of shipping documents. A claim, which was, as I think, for the latter relief, succeeded before Kennedy J. in 1906: see *Barton Thompson & Co.* v. *Vigers Brothers.* (1) A claim for payment of the price failed before Pickford J. in 1913 (see *Jordeson & Co. & Kahn* v. *London Hardwood Co.* (2)), as did a similar claim before Rowlatt J. and the Court of Appeal in 1931: see *Flatau, Dick & Co.* v. *Keeping.* (3) I do not gather that Scrutton L.J. disagreed with the decision of Kennedy J. above referred to, if it was based on a claim for return of the shipping documents, and it appears from his judgment that there was also a decision (unreported) of another very eminent judge, Hamilton J., to a like effect as that of Kennedy J.

This form of claim for return of documents and the approval it has received in these cases has a bearing on another matter discussed at the trial and on the appeal—namely, what was the consideration for the bills; but otherwise, though historically interesting, they have no great bearing on the present case and indeed are wholly different from it in the most material respect. This was recognized by Branson J., who said that these cases were " not on all fours " with the present case, inasmuch as in this case drafts which were drafts of the plaintiffs had been accepted by the defendant in exchange for the shipping documents. The plaintiffs' contention is that this makes all the difference and that when they got the acceptances then on well established principles of law and equity they got the protection which I observe Romer L.J. in his judgment in *Flatau, Dick & Co.* v. *Keeping* (4) thought could and ought to be obtainable by means recognized in equity as available.

Branson J. based his decision on an acceptance of the defendant's contention as to agency or trusteeship, which I

(1) 19 Com. Cas. 175.
(2) 19 Com. Cas. 161.
(3) 36 Com. Cas. 243.
(4) Ibid. 243, 257.

have quoted from an earlier passage in his judgment. He said this: "It is contended by the plaintiffs that by this acceptance a new contract arose between them and the defendant under which the defendant contracted to pay them the amount of the acceptances without regard to any question which might arise between the defendant and Raahes as to the timber. The consideration alleged for the contract is the handing over by the plaintiffs to the defendant of the shipping documents. To this the best answer made by the defendant is, in my opinion, that no new contract was made at all."

Now I quite agree with the respondent's counsel that the learned judge did not mean by this that the bills did not constitute contracts. The emphasis is on the word "new" meaning a contract independent of the sale contracts. The judgment goes on to expand this reasoning, and it is plain that the ground of the conclusion adverse to the plaintiffs is that in the view of the judge they were throughout agents and trustees for Raahes and had no better rights than Raahes, and therefore though they could sue they could not succeed. It is on this conclusion as to the position and therefore as to the rights of the plaintiffs that in my opinion the learned judge was in error. It is, of course, true that the plaintiffs were Raahes' authorized agents to receive payment when they handed over shipping documents. It was necessary and right that some one should be nominated in order that the buyer might get a discharge of his debt. But in dealing with either money or a bill of exchange the person receiving them might hold them for the seller or for himself in his own right according to the circumstances regulating his relationship to the seller. The bills were contracts and the only contracts between the plaintiffs and the defendant. The Law Merchant and Common Law founded thereon of themselves, as I think, had regard only to the parties to negotiable instruments, and it was only because equity intervened and later because equitable defences were admissible at law that it was a good answer to a suit on such an instrument that he who brought it was trustee for another against whom the person sued had a good answer: see *Cochrane* v. *Green* (1); *Agra and Masterman's Bank, Ld.* v. *Leighton* (2), and *Thornton* v. *Maynard.* (3)

On the facts of this case I am of opinion that the plaintiffs were in no sense trustees or agents for Raahes when they sought to recover on the bills. I see no difference between their position and that of a bank if payment to a bank had been directed by Raahes. If either the bank or the plaintiffs were collecting the proceeds of the bills for Raahes an answer good against Raahes would be an answer against the bank and against the plaintiffs; but if the bank had paid or settled with Raahes, as the plaintiffs had done here, then the bank could as I think collect the proceeds of the bills and succeed in a suit if payment were refused on the ground of the existence of a claim against Raahes on contracts to which the bank was no party. The plaintiffs, as I see it, are in no different position. It was somewhat faintly argued that they were, because they were the agents who effected the contracts of sale. But as they were not parties to those contracts the circumstances of their agency in that regard seems to me to be wholly irrelevant.

For these reasons I think the judgment below cannot be supported on the grounds assigned by the learned judge. The respondent, however, sought to support the judgment on another ground as to which when it was presented to him the trial judge was against him. The ground was that the consideration for the bills of exchange had wholly failed when the goods turned out not to be the contract goods, so that the defendant was entitled to reject them. As to this Branson J. said: " I think that if it be assumed that a new contract arose upon the acceptances this contention presents some difficulty by reason of the fact that the consideration is stated in the acceptances to be ' value received in wood-goods per s.s. *Sonja* ' with no reference to the description in the original contracts of sale, and it is therefore impossible without going outside the new contract to show a failure of consideration." I so entirely concur in this reasoning of the learned judge that I only add two observations. The first is that the value expressly stated in the bills was in my opinion complete when the right of disposition over the *Sonja's* cargo was given up by the handing over of the shipping documents. The second is that the bills were intended to be negotiable instruments, and though it would no doubt be possible in such documents to embody in express terms such a stipulation as "Wood-goods per *Sonja* in accordance with contracts of sale dated so and so," or "the terms or conditions of contracts of sale are incorporated herein" such expressions would be so unfamiliar and so contrary to the nature and tenor of an instrument intended to be negotiable (even if they did not make the bills conditional and therefore invalid) as to enforce the conclusion that it would be improper to imply them and as inadmissible, as on the facts it would be impossible, to prove that it was the intention of the parties to vary the description of the consideration contained in the bills by the inclusion of such an additional stipulation. For these reasons I am of opinion that the appeal should be allowed and judgment entered for the plaintiffs with costs here and below.

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(1) 9 C. B. (N. S.) 448, 467, 468.
(2) L. R. 2 Ex. 56, 65.
(3) L. R. 10 C. P. 695.

SCOTT L.J. I agree with the statement of the facts contained in Lord Roche's judgment, and content myself with an epitome of those which in my view are alone material for our decision. They are very simple. As indeed appears from the cases cited on the argument of this appeal, it is notoriously common in the overseas timber trade of the United Kingdom for firms of agents like Churchill & Sim to act for North European sellers on *del credere* terms, receiving a comparatively high rate of commission as remuneration for their assumption of responsibility for the discharge by the buyers here of their contractual obligations to their sellers. Under this practice the seller forwards the shipping documents to the agent, who thus from the invoice sees the price receivable from the buyer, and by the bill of lading obtains possession of the goods. The agent thereupon, or within a few days, pursuant to his *del credere* undertaking, pays his principal the invoice price less his commission. Whether the agent then by operation of law gets a possessory lien on the goods or not, as was argued for the appellants, it is in my view unnecessary to decide. In any case he has possession of the goods and will not part with that, unless he gets from the buyer cash or approved acceptance sufficient in amount to recoup his outlay to his principal the seller and to cover his *del credere* commission. He must get his money in this way, and it is to meet this commercial need of the *del credere* agreement, that the provision is inserted in the usual forms of contract of sale, providing in effect that if the buyer wants the usual trade credit terms he must give an " approved " acceptance whether drawn by the seller or by his " authorized agent." If the seller himself draws, he sends his draft with the shipping documents to the agent. If he does not draw himself, he chooses his " authorized agent "—it may be a bank, or it may be his own *del credere* agent—and instructs him to draw on the buyer. The word " approved " before " acceptance " empowers the seller or his authorized agent as the case may be, in the event of the buyer's financial standing not being thought good enough, to require a satisfactory name on the bill—if the buyer wants to use his option to ask for credit terms. Whether the seller draws himself or authorizes somebody else to draw for him, he must send the bill of lading to the *del credere* agent in order to put him in possession of the goods, as the latter will not pay the principal his net purchase price, unless he has that possession. This being the course of business, it follows that if the seller chooses to draw himself, he will insert the name of his *del credere* agent as the payee ; if he " authorizes " a bank to draw, he will at the same time instruct the bank to protect the *del credere* agent by obtaining his " approval " of the buyer's name, or at any rate by seeing that the acceptance is financially " an approved acceptance," by drawing in favour of the agent or endorsing to him, by refusing to part with the shipping documents to the buyer except in exchange for his " approved " acceptance, and finally by holding the acceptance on the agent's behalf, since he alone is interested in it, having already paid the seller the whole of his net invoice price. On the other hand the seller is free to nominate his own *del credere* agent as his "authorized agent" and instruct him to draw upon the buyer. In this event the agent protects himself by refusing to part with possession of the goods, which the bill of lading confers on him, except in exchange for the "approved acceptance" of the buyer.

The last course was followed in this case. On October 12, 1934, the appellants received the shipping documents from their principals, enclosed in an air-mail letter of the 9th, requesting payment to their principals' bank in London. The respondent elected not to pay cash, and the appellants accordingly on October 22 sent him for acceptance their own two drafts payable to drawer's order together with the shipping documents, thus tacitly "approving" his name. The bills were expressed to be for "value received in woodgoods per s.s. *Sonja*," the carrying vessel named in the bills of lading. On the 23rd the appellants paid the net invoice price to the sellers' bank. On the 26th the respondent returned the drafts duly accepted.

On November 2 the respondent rejected the goods—rightfully, as it subsequently turned out after arbitration—and wrote the appellants informing them of the rejection and saying that "he held the shipping documents to their order." On February 11 he dishonoured his acceptances on presentation: on the 14th a specially endorsed writ was issued against him by the appellants. I omit any reference to the detailed facts of an intermediate endorsement of the bills to a bank for collection, as it was cancelled.

The defence, logically analysed, rests on three contentions: (1.) that the appellants were acting in the bill of exchange transaction merely as agents and trustees for the sellers—implying (although the defence did not say so) that there was no contract made by the bill of exchange transaction between the appellants as drawers and payees and the respondent as acceptor: alternatively, if there was such a contract—i.e., a contract by negotiable instrument to which the appellants were party in their own right, (2.) that there was no consideration for it, or in the further alternative, (3.) that the consideration, if any, totally failed. The learned judge upheld the respondent's defence No. 1, holding that there was no new contract effected by the bill of exchange transaction, that in it the appellants were mere trustees for the sellers, and that the position was the same as if the sellers were plaintiffs suing on their contract of sale. At the time of his judgment the decision of the arbitrator had not been given, and the learned judge therefore did not know whether the basis of fact as to the contract of sale was rejection with consequent total failure of consideration, or damages for breach of warranty in diminution of price. He accordingly did not discuss the questions which had been argued on those alternatives, and contented himself with the conclusion of law which he drew from the undisputed facts, that no new contract at all had been made by the bills of exchange, or, in other words, that no cause of action existed except possibly under the contract of sale. Taking this view, he discussed the cases of *Barton Thompson & Co.* v. *Vigers Brothers* (1); *Jordeson & Co. & Kahn* v. *London Hardwood Co.* (2); and *Flatau, Dick & Co.* v. *Keeping* (3), as possibly germane, although he expressly distinguished them from the present case.

From his decision in favour of the defendant the plaintiffs appealed, but the arbitration had not yet been concluded, and the other division of this Court adjourned the appeal till after the arbitration proceedings were concluded. In November last a special case stated by the umpire was heard by Lewis J., and thereafter pursuant to his decision an award was made that the buyer was entitled to reject. The appeal then came before us, the parties agreeing the facts as stated in the award. The appellants claimed upon the contract by the bills of exchange, in their own right, or alternatively as entitled to a lien on the goods; the respondent repeating the arguments which he had pleaded as above set out—and contending that there was no contract by the bills of exchange. The above three cases referred to by the learned judge were also discussed

(1) 19 Com. Cas. 175.
(2) 19 Com. Cas. 161.
(3) (1931) 39 Ll. L. R. 42, 232; 36 Com. Cas. 243.

before us. In my view, whilst historically interesting, they are really irrelevant to the decision of this case: as the learned judge pointed out, the action there was not on any negotiable instrument. Several cases were cited to us to show that in certain circumstances the fact that one or other party to a bill of exchange transaction is in the position of a trustee may as between immediate parties modify the ex facie rights of the instrument. These decisions also are to my mind irrelevant, because here the appellants were protecting their own rights by obtaining the respondent's acceptances, and are claiming in the action in their own interest exclusively, and in nowise as agents.

Lastly, various decisions about failure of consideration were cited to establish the well-accepted principle that if the consideration for a bill of exchange wholly fails, then as between immediate parties the contract created by the instrument is discharged and the acceptor released. These authorities also call for no discussion, as there is no doubt as to the principle.

This appeal in my view can and ought to be decided on certain elementary grounds of bills of exchange law. The appellants sue as holders for value under s. 38, sub-s. 1, and s. 27, sub-s. 1, of the Bills of Exchange Act, 1882. They ask that the respondent should be held liable under s. 54, sub-s. 1. They point out that they were payees as well as drawers, and were therefore holders within s. 2; that not only was value to be presumed in their favour (s. 30, sub-s. 1), and that the respondent gave no evidence to disprove it, but that here the bills expressly stated the consideration which constituted the "value" (see s. 2) in the words "value received in wood-goods per s.s. *Sonja*"; and finally that those words were true in fact since by delivery to the respondent of the bills of lading they gave him possession of the timber—"value received in wood-goods." In my judgment this argument is sound, apart from the further question of failure of consideration. It does not matter that the appellants had no proprietary interest in the goods; it may be they did not even have a possessory lien—I express no opinion on

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that point one way or the other. But they had both in law and fact possession of the timber:—see Pollock and Wright on Possession, 1888, c. ii., s. 6, and per Kennedy L.J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (1), in the well known judgment which was subsequently approved in the House of Lords; and the transfer of possession to the respondent was authorized by the seller. It was thus certainly a good consideration for the respondent's acceptance, i.e., for making the contract contained in the bill of exchange. The presence of consideration is not an essential element of a bill of exchange contract as of an ordinary contract not under seal—it is presumed by the Act, and was presumed by our Law Merchant before the Act. But as between immediate parties the defendant is entitled to prove absence of consideration moving from the plaintiff as a defence to an action on the bill, and it is in replication to this defence that it was important for the appellants to point out that the respondent's acceptance recorded the receipt of the consideration, and further that the consideration was in fact given. There can to my mind be no question in the present case that the appellants gave good consideration—i.e., " value " within the meaning of the Act.

Then did that consideration fail? Has the respondent discharged the burden of proving failure? Has he given any evidence of failure? On this part of the case I think the learned judge was right in his view, which was adverse to the defendant, and I am satisfied that each of these questions must be answered in the negative. The respondent got precisely what he bargained for in his written bill of exchange contract—possession of the wood-goods per s.s. *Sonja*. It may be that he got additional consideration in the other shipping documents—the invoices, copies, etc., but that is an immaterial addition. It is equally true that the giving up of possession by the appellants was in a business sense an act of vital importance to them. They were out of their money: they had not been paid their commission; and the only business security they had—

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(1) [1911] 1 K. B. 934, 956, 957.

whether legal or not does not matter—was the bills of lading. And it was just because our English bill of exchange law treats a bill of exchange in the hands of a holder for value in so many respects as almost like currency, that they could safely part with their sole business security in exchange for the respondent's acceptance. In truth it is only if this is the law that such a course of business could for practical purposes be followed.

If after parting with possession of the bill of lading the *del credere* agent could be met with a defence founded on events for which he is in no sense responsible, such as the discovery by the buyers of a default by the seller on his contract of sale, it is obvious that this danger would make the above course of business impracticable. But I do not think there is anything in this defence. I see no ground whatever for the contention that there was any failure of the consideration contained in or given for the bill of exchange contract—which is the only consideration that is material to the action on the bill. That there was default and failure of consideration under the sale of goods contract is nihil ad rem. The *del credere* agent might well say as a business man: "I did not guarantee my principal against financial loss through his own breaches of his contract of sale"; and in my view the law—indirectly, no doubt, by the road I have travelled above—supports him.

The respondent as acceptor got the very consideration for which he bargained—namely, possession of "the wood-goods per s.s. *Sonja*," and there was no failure of that consideration. The defence founded on the contention that the appellants were in the bill of exchange contract "mere agents and trustees for the sellers" fails altogether, quite simply because it was not the fact. They entered into the bill of exchange contract for themselves, and in their own right. And for the same reason it follows that I hold that the learned judge was wrong in his view that as between appellants and respondent there was no new contract made by the bill of exchange transaction. It was of the very essence of the business position that a wholly new and independent

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contractual relationship was created by it, and one in which the sellers had in the circumstances no concern.

For these reasons I agree that the appeal must be allowed, and an order made in the terms pronounced by Lord Roche.

EVE J. I have had an opportunity of reading the judgments of Lord Roche and Scott L.J. which have just been delivered, and I agree so entirely with the conclusions at which they have arrived that I cannot say more than that I concur that this appeal must be allowed.

Appeal allowed.

Solicitors for the appellants: *Coward, Chance & Co.*

Solicitors for the respondent: *Blundell, Baker & Co., for Snowball, Kyffin Taylor & Pruddah, Liverpool.*

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SKILTON *v.* EPSOM AND EWELL URBAN DISTRICT COUNCIL.

Highway—Insertion of traffic studs in highway—Loose stud—Injury to cyclist using road—Negligence of local authority—Doctrine of non-liability for non-repair of highway, whether applicable—Liability of highway authority—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 48.

The plaintiff whilst cycling along a road in the defendants' area reached a line of traffic studs at the same time as a motor-car. As the car passed her one of the studs which had become loose shot out and struck her bicycle with such force as to overturn it, and the plaintiff was thrown to the ground and injured. The studs were inserted in the road by the defendants as the highway authority under the powers conferred on them by s. 48 of the Road Traffic Act, 1930, for the purpose of regulating the traffic, and there was evidence that the particular stud had been defective for some time. In an action brought by the plaintiff for damages for personal injury the defendants contended that the stud formed part of the highway, and that the plaintiff had not proved misfeasance, for which alone a highway authority could be held liable:—

Held, that assuming, but without deciding, that the stud was physically part of the highway, the placing therein of the stud

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in such a manner that it became defective amounted to the placing of a nuisance on the highway, and that the defendants could not take advantage of the cases which dealt with maintenance of the highway, because the stud was not brought on to the highway as part of the maintenance of the highway under the Highway Act, 1835, but for the purposes of traffic direction under the powers conferred on the defendants by the Road Traffic Act, 1930.

Appeal from a decision of the deputy judge of the Redhill County Court in an action in which the plaintiff, Mrs. Elsie M. Skilton, a resident of Epsom, sued the Epsom and Ewell Urban District Council for 30*l.* damages for personal injuries.

On July 10, 1935, the respondent, Mrs. Skilton, was riding on her bicycle along the Hook Road from East Street in the area in which the Espom and Ewell Urban District Council are the highway authority. She was passing a part of the road where, in the middle of the road, there is for the purpose of directing the traffic a line of studs. She was about two or three feet away from the kerb, when a car passed her, and one of the studs shot out across the road and knocked the front wheel of her bicycle, with the result that she fell and sustained injuries.

Two persons were called on her behalf to say that the stud had for some time been in a defective condition. A Mrs. Drew, who lived in Hook Road and who saw the accident, said that a stud used to rattle when traffic went by, but she could not say how long it had done so. She also said that she had seen the stud wobble. A Mr. Drew, who also lived in Hook Road, said that he knew that the stud wobbled, that his attention had been directed to it, and that he first noticed that it was loose on Derby Day. The council called no evidence.

The county court judge accepted the evidence of those witnesses, and in his judgment came to the conclusion that the stud had been in a dangerous condition for at least three weeks. He used the following words: "Two witnesses for the plaintiff, however, satisfied me that it had been in a loose (and, therefore, in my view dangerous) condition for at least three weeks."

The county court judge accordingly found in favour of the plaintiff and gave judgment for the plaintiff for 30*l.*, the amount claimed.

The defendants appealed. The appeal was heard on April 24 and 27, 1936.

Charles Doughty K.C. and *W. B. Franklin* for the appellants. In this case the defendant council are sued as the surveyor of highways, and the county court judge has held that the stud was part of the highway. What constitutes, or forms part of the highway for the purpose of repairs is a question of fact: Pratt & Mackenzie's Law of Highways, 18th ed., p. 85; *Reg.* v. *Inhabitants of Lordsmere, in Yorkshire.* (1)

[Slesser L.J. referred to *Liddle* v. *Yorkshire* (*North Riding*) *County Council.* (2)]

There was here no evidence from which the judge could come to the conclusion that the stud was a separate erection and not part of the highway. It was clearly, it is submitted, part of the highway.

In *Papworth* v. *Battersea Corporation* (3), where the plaintiff was riding along a road in the defendants' area and was, owing to the defective condition of the gully, thrown from her bicycle and injured, it was held by Horridge J. that although not liable as the highway authority for damages for the injuries sustained by the plaintiff, the defendants were liable as the sewer authority for not remedying the defect in the gully.

The power to insert these studs in the roads is conferred on the highway authority by s. 48 of the Road Traffic Act, 1930, thus showing that the studs are part of the highway: see ss. 59 and 101.

[Slesser L.J. referred to *Cowley* v. *Newmarket Local Board.* (4)]

A surveyor of highways could not have been sued for non-feasance. There is no case in the books where a surveyor has been held liable for mere non-feasance. And the law is the same with regard to highway authorities who have succeeded to the powers of the surveyors.

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(1) (1886) 2 Times L. R. 623; 54 L. T. 766.

2) [1934] 2 K. B. 101.

(3) [1914] 2 K. B. 89; [1915] 1 K. B. 392.

(4) [1892] A. C. 345.

[SLESSER L.J. referred to *Gibson* v. *Mayor of Preston.* (1)]

Highway authorities have power to set up boundaries to their highways: *Whyler* v. *Bingham Rural Council.* (2)

[SLESSER L.J. referred to *Masters* v. *Hampshire County Council.* (6)]

As to whether the defendants are liable for mere non-feasance see Salmon on Torts, 8th ed., p. 303, where it is laid down that "It is a misfeasance within the meaning of this rule, and not a mere non-feasance, to erect or place in the highway any artificial structure which is not itself a part of the highway, and then to allow that structure, as opposed to the highway itself to fall into a dangerous state of repair," citing *White* v. *Hindley Board of Health.* (3) The point is dealt with in *Municipality of Pictou* v. *Geldert* (4), where it is laid down that public corporations to which an obligation to keep public roads and bridges in repair has been transferred are not liable to an action in respect of mere non-feasance, unless the Legislature has shown an intention to impose such a liability upon them.

[SLESSER L.J. That case seems merely to have followed *Cowley* v. *Newmarket Local Board.* (5)]

In *Tregellas* v. *London County Council* (6) the plaintiff suffered personal injuries through the defendants' neglect of their duty to lop the branches of the trees in Victoria Park, and it was held that this being mere non-feasance the defendants were not liable.

[SLESSER L.J. I do not think that case has any bearing on the present.]

[ROMER L.J. The whole matter is founded on *Russell* v. *The Men of Devon.* (7)]

Absolutely.

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(1) (1870) L. R. 5 Q. B. 218.
(2) [1901] 1 Q. B. 45.
(3) (1915) 84 L. J. (K. B.) 2194.
(4) (1875) L. R. 10 Q. B. 219.
(5) [1893] A. C. 524.
(6) (1897) 14 Times L. R. 55.
(7) (1788) 2 T. R. 667.

[Romer L.J. The question is whether the defendants have succeeded to the liabilities of the inhabitants.]

There is nothing in the Road Traffic Act, 1930, to take away the privileges which the surveyor of highways had under the old common law. No further liabilities have been put upon him and he has not been made liable for mere non-feasance.

Tristram Beresford K.C. and *Eric White* for the respondent. The immunity given to the inhabitants in the case of non-feasance was on the assumption that the highway would be used in a normal manner. Here the traffic studs were not necessary for traffic along the highway. They were used only for directing the traffic. It would be wrong therefore to extend the immunity further than is necessary. The road here is now being used abnormally, and it is the abnormal user which makes the difference in the liability.

In *Borough of Bathurst* v. *Macpherson* (1) Sir Barnes Peacock said that " the duty was cast on them [the appellants] of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger, when it arose." Those words apply to the present case.

Here there was a placing of something on the highway by the defendants which they were bound to look after. It was not done by the defendants in connection with the repair of the highway, and therefore the immunity for non-repair does not attach in this case. The defendants were therefore bound to see that the alteration of the highway by them did not become a danger to the public. The defendants by their omission to keep the stud in proper repair were guilty of a misfeasance for the consequences of which they are liable in damages to the plaintiff: see *McClelland* v. *Manchester Corporation.* (2)

[He was stopped.]

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(1) (1879) 4 App. Cas. 256, 265.

(2) [1912] 1 K. B. 118.

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Doughty K.C. in reply referred to *Moul* v. *Thomas Tilling, Ltd.* (1) and *Sydney Municipal Council* v. *Bourke.* (2)

SLESSER L.J. This is a difficult and important case, but as the Court has come to a clear conclusion we have not thought it necessary to reserve judgment. The facts are these. [His Lordship stated the facts set out above and continued:] Upon those facts there arise difficult questions of law. First of all, the judge applied his mind to this question: Did the studs form part of the highway? He came to the conclusion that the stud was an artificial work distinct from the highway, and he quoted from Sir Barnes Peacock in *Borough of Bathurst* v. *Macpherson* (3) that "the duty was cast upon them [the appellants] of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger, when it arose." On that finding, the judge came to the conclusion that the accident was due to the negligence of the defendants.

For reasons which will appear later, I doubt very much, with every respect to the judge, whether a conclusion that the stud was not a part of the highway is necessarily decisive of the problem which has to be determined in this case. I am not prepared, speaking for myself, to express a final opinion, whether physically this stud was or was not a part of the highway. We have not seen the stud in question. We do not know exactly how it was fixed to the highway or exactly what its construction was; nor whether it justifies the description which the judge applied to it—quoting the *Bathurst* case (1)—that it was an artificial work. But be that as it may, I will assume for the purposes of this case that the stud may properly be said to be physically a part of the highway. The problem has arisen before in various ways in connection with grids over open drains, manholes and the like. Questions have frequently arisen in the Courts whether some work which covers up a hole in the highway can or cannot possibly be said to be a part of the highway. In *White* v. *Hindley Local Board of Health* (1) the plaintiff's horse was being ridden along a highway under which was a sewer, and his horse trod on a grid or grating put there to drain the surface-water off the road into the sewer. Blackburn J. expressed the opinion, in asking whether the grid was part of the sewer or part of the highway, that possibly it was part of both.

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(1) (1918) 88 L. J. (K. B.) 505.

(2) [1895] A. C. 433, 443.

(3) 4 App. Cas. 256, 265.

As I say, I do not think it necessary in the view which I take of this case to decide whether the judge was or was not right in coming to the conclusion that this stud was not part of the highway.

The question to be decided by the Court is essentially this. Have the defendants caused a nuisance? If they have, it may be that they are responsible to a person who has been injured as a consequence of that nuisance. There is, however, an important exception to the general principle of liability. In the case of the maintenance of highways, for a very long time indeed, it has been held that a local authority who are the highway authority are not responsible for the mere non-repair of the highway. It is not necessary for this purpose, though the matter appears in some of the older abridgements, to go back further than *Russell* v. *The Men of Devon* (2), in which, I think, the side-note expresses accurately the view of the Court: "No action will lie by an individual against the inhabitants of a county, for an injury sustained in consequence of a county bridge being out of repair." In that case, it was pointed out by the Court that the difficulty which would arise in suing the inhabitants at large would primarily be a difficulty of procedure. Lord Kenyon said (3) that if the experiment of suing the inhabitants for non-repair had succeeded it would have been productive of an infinity of actions, and he then went on to point out that where liability had been successfully laid it had been in cases where the authority was an authority in the nature of a corporation or quasi corporation and not in cases which were against the inhabitants at large. That authority has not been doubted.

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(1) L. R. 10 Q. B. 219.

(2) 2 T. R. 667.

(3) Ibid. 671.

But the problem has arisen since that time whether subsequent legislation, which has vested the responsibilities and powers to maintain the highway not in the inhabitants at large but in the surveyor of highways, and subsequently in local authorities who have inherited his duties and powers, has made any difference to the view expressed in *Russell* v. *The Men of Devon* (1). It is not necessary to consider all the cases, but I come immediately to the leading case of *Cowley* v. *Newmarket Local Board* (2), to the effect that, although the powers and liabilities of the surveyors of highways which they had inherited from the inhabitants of the county or hundred at large had been vested by the Public Health Act in an urban board as the local authority for the district, the principle expressed in the earlier cases still obtained. Lord Herschell pointed out (3): " It was held as long ago as the case of *Russell* v. *The Men of Devon* (1), that an action could not be maintained at common law by one of the public in respect of an injury sustained through a highway being out of repair. This decision was no doubt largely, but it was not exclusively, founded on the fact that the inhabitants of the county are not a corporation, and cannot be sued collectively. In the subsequent action of *M'Kinnon* v. *Penson* (4) brought against the county in the name of their surveyor for a similar cause, it was urged that the 43 Geo. 3, c. 59, s. 4, which enacted that the county might be sued in the name of their surveyor, had removed the only difficulty in the way of the plaintiff. It was held, however, that the effect of the statute was not to create a new liability, but only a more convenient method of enforcing existing rights." He then cited *Gibson* v. *Mayor of Preston* (5), which was to the like effect, because the corporation there had become the highway authority as well as the municipal authority, and there again they were similarly held not liable for the non-repair of the highway.

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(1) 2 T. R. 667.
(2) [1892] A. C. 345.
(3) Ibid. 353.
(4) (1853) 8 Ex. 319; (1854) 9 Ex. 609.
(5) L. R. 5 Q. B. 218.

We conceive that if the present case were merely one of the non-repair of the highway by the defendants in carrying out their duties either at common law or as imposed upon them by the Highway Act, 1835, or any other legislation, there can be no finding but that the plaintiff must fail if the stud was in fact part of the highway. But I have come to the conclusion, notwithstanding Mr. Doughty's statement that no action has ever been allowed to succeed in such a case against a highway authority before—an observation which, I beg leave to state, I think is not quite accurate—that it would be wrong in this case to hold that the insertion of this stud into the road under the powers given to the local authority can in any way be said to be an act connected with the maintenance or the repair of the highway as such. To explain why I come to that conclusion, it is necessary to look at the Road Traffic Act, 1930, which enables the local authority to insert the traffic signs, as they are called, or place them on the highway.

The Road Traffic Act, 1930, it is to be observed, has nothing whatever to do, so far as we are here concerned, with the maintenance of the highway. It is an Act to make provision for the regulation of traffic on roads and of motor vehicles and otherwise. In Part III., s. 48, power is given to the highway authority as defined in that section and in the Act to cause or to permit traffic signs to be placed on or near any road in their area (sub-s. 1). It is not confined to a power to place traffic signs on the road. Those traffic signs are to be of a prescribed size, colour and type (sub-s. 2). By sub-s. 3 after the commencement of the Act no traffic signs are to be placed on or near the road except in accordance with those two preceding provisions. But the Act appears to contemplate, and the section, I think, makes it clear, that the power to erect signs is not limited to what would generally be called at common law a highway authority, being an authority which derives its powers or duties of maintenance or repair from the inhabitants at large or from

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the surveyor of highways. There is in s. 121 a definition of a highway authority which applies to the Act generally —namely, that a "'highway authority' in relation to any road, means the authority (being either the council of a county, the council of a county borough, the council of an urban district, the common council of the City of London, or the council of a metropolitan borough) which is responsible for the maintenance of the road." That in general would include, or would be apt to include, just those highways powers which have been derived from the old surveyor of highways. By s. 48 the Legislature is at pains to extend the definition, and gives a further definition, saying "(9.) In this Part of this Act, the expression 'traffic sign,' includes all signals, warning sign posts, direction posts, signs, or other devices for the guidance or direction of persons using roads; and in this section the expression 'highway authority' includes any person responsible for the maintenance of a road." Then in the proviso to sub-s. 3 of s. 48, which is the sub-section providing that no traffic signs shall be placed on or near any road except in accordance with the provisions of the section, it states: "Provided that nothing in this sub-section shall apply to any notice in respect of the use of a bridge or to any traffic sign placed by the owners or workers of any tramway, light railway, or trolly vehicle undertaking, any dock undertaking or any harbour undertaking in pursuance of powers conferred by any special Act of Parliament or order having the force of an Act." So that there can be cases, as appears clear from the sub-section, where the highway authority having authority to place traffic signs will not be an authority deriving its powers from the old surveyor of highways or from the inhabitants at large, but may be an authority, like a dock authority, having special powers for regulating its area conferred upon it, possibly by a private Act, or otherwise. In such cases, as is shown by *Mersey Docks Trustees* v. *Gibbs* (1) and other cases to the like effect, this doctrine of the absence of liability for the non-repair of highways does not apply, and it may be

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(1) (1866) L. R. 1 H. L. 93.

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that in such cases as *Mersey Docks Trustees* v. *Gibbs* (1) a body may be made liable for causing a nuisance where they invite persons on to their area or where they are required by statute to enable persons to use that area.

In other words, it appears to me clear, from the very definition of a highway in s. 48, that that definition is dealing with highways which are old highways under the old authority of the surveyor, with highways which may be used by dock authorities and also any other kind of highways which may arise by statutory dedication, or in any other way, the language being " any person responsible for the maintenance of a road."

From that point of view, it appears that it had never been the intention of this legislation in any way to treat the placing of these traffic signs on this road as any part of the maintenance of a highway repairable or maintainable at common law. It is dealing with any kind of road the maintenance of which is made the responsibility of any person.

Passing from that, one has next to consider a series of authorities which have dealt with the problem when a person is injured by anything defective on the highway for which the responsibility of maintenance is not in the highway authority as such. For this purpose it is not necessary to consider many authorities. *White* v. *Hindley Local Board* (2), which was mentioned by the county court judge in his judgment, is a good example. That was a case where, as the plaintiff's horse was being ridden along a highway, under which was a sewer, his horse trod on a grid, or grating, put there to drain the surface-water off the road into the sewer. The grid being in a defective state gave way, and the horse's leg was injured. The plaintiff brought an action against the local board of health of the district, who were the surveyors of the highway by ss. 68, 117, of 11 & 12 Vict. c. 63, in whom also the sewers were vested under ss. 43, 45, and it was held that, though the defendants might not be liable as surveyors of the highway, they were liable as

(1) L. R. 1 H. L. 93. (2) L. R. 10 Q. B. 219.

owners of the sewer, of which the grid formed part, for negligence in not keeping the grid in a proper state. A recent authority to the like effect is *Papworth* v. *Battersea Corporation.* (1) There is a number of other cases to the same effect. It is said in *Papworth's* case (1) that *White* v. *Hindley Local Board* (2) was followed.

As to those cases, Mr. Doughty says that although the authority in these cases were both the highway authority and the drainage authority, they were being held liable only in the latter capacity. In my view, that is not a distinction which can be made when the principle to be considered is examined. The question is not, in my opinion, whether the body which is sought to be made liable for non-reparation is or is not the same body as that which is responsible for the maintenance of the road, but whether the particular alleged nuisance or injury which they have permitted is one which they have done in their capacity as repairers of the road or in carrying out their obligations or powers under some different statute.

I differ respectfully from Mr. Doughty when he says there is no authority on this point. I think authority is to be found in *Borough of Bathurst* v. *Macpherson.* (3) That decision is not binding on us, being one of the Privy Council, but it is naturally one to which we would pay the very greatest respect. There an authority had a duty under one specific Act—namely, the local Act of the Dominion from which the appeal was brought—to construct a street and maintain it, and to be responsible for the drains, gutters or sewers. A man who was riding in the road passed over a barrel drain which had been lined in brickwork which had broken away and, not having been repaired, had caused a hole into which the plaintiff's horse fell, carrying the plaintiff with him, crushing his leg against one side of the hole and causing a compound fracture of the leg. "In an action claiming damages against the municipality (*a*) for negligence in constructing the street, and (*b*) for negligence in keeping and

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(1) [1914] 2 K. B. 89, 90.
(2) L. R. 10 Q. B. 219.
(3) 4 App. Cas. 256, 263.

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maintaining the street, and not repairing the drain, gutter, or sewer . . . . the Chief Justice directed the jury that the defendants under their Act of incorporation, were not liable for the result of any mere nonfeasance; that if they thought fit to construct a sewer, and did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance, but if they constructed the sewer properly in the first instance and it became defective afterwards they were not bound to repair it."

That view was appealed from, and it was held to be a misdirection, for it was said that the barrel drain was not only made by the defendants, but the sole control and management of it were by statute vested in them, and by reason of their construction of the drain and their neglect to repair it they had caused a nuisance in the highway for which they would be liable on indictment and were liable to action by the plaintiff. That case rests upon the view that where a nuisance has been created a person may have a remedy for damages suffered by that nuisance when it is something more than the mere failure to repair the highway. The later case of *McClelland* v. *Manchester Corporation* (1) is another authority.

In my opinion placing a stud on the road in question in the present case in such a manner that it became defective and, as the judge found, had been defective for three weeks, did amount to the act of placing a nuisance on the highway. The judge came to the conclusion that the fact that the stud had been loose and, therefore, dangerous for at least three weeks ought to have come to the defendants' knowledge if they and their servants had exercised ordinary care and diligence, which it was their duty to do. In other words, in exercising their power, albeit they were the highway authority—not as the highway authority, but to direct the traffic—they brought on to that road a dangerous thing which they did not take precautions to maintain in a safe condition, and they cannot take advantage of the cases which have dealt with the maintenance of the highway, because this stud, whether it was part of the highway or not, was not on the road for any purpose of the maintenance of the highway but for the purpose of traffic direction under the Road Traffic Act, 1930, which gave powers, as Swift J. pointed out in the course of the case, to the authority to bring criminal proceedings if its directions were disobeyed. The mere fact of the stud's being on the highway in this particular case does not, in my opinion, make this act of putting it there a part of the maintenance of the highway at all. It is a case essentially of bringing a nuisance on the highway, in which case the authority are responsible if that which by its nature may be dangerous by want of proper maintenance and by want of proper reparation is allowed to be in such a dangerous condition as to cause injury to a passer-by.

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(1) [1912] 1 K. B. 118.

For these reasons, which do not quite accord with those given by the county court judge, I am of opinion that this appeal fails.

Romer L.J. I agree. This case was presented to the Court by Mr. Doughty as one in which an attempt was being made to render the highway authority liable for non-repair of the highway. Since the decision of the House of Lords in *Cowley* v. *Newmarket Local Board* (1), and indeed, I think, long before that, any such attempt must necessarily fail. I do not so regard this action. Like Slesser L.J. I refrain from expressing any concluded view whether the stud which flew from its position on the roadway and injured the plaintiff was or was not part of the highway. For the purpose of my decision, I am willing to assume that it was. Nevertheless, I think that the defendants have been rightly made liable for the damage caused to the plaintiff, and for this reason: they have done something on the highway not for the purpose of maintaining it as a highway but for some totally different purpose, and the act which they did had become at the time the injury was caused to the plaintiff a nuisance to the highway for which they were, in my opinion, properly made liable,

(1) [1892] A. C. 345.

notwithstanding the fact that they are also the highway authority.

There is, I think, ample authority to be found in the books for the proposition that a person causing a nuisance on the highway of such a nature may be held liable although he happens also to be a surveyor of highways or other highway authority. Slesser L.J. has referred to some of those cases. In particular, he has referred to the decision of the Privy Council in *Borough of Bathurst* v. *Macpherson.* (1) There the Borough of Bathurst were held liable for something that they had done on the highway which was properly done at the time it was done, but by reason of neglect on their part had got into such a state that it occasioned a nuisance to the highway. They were held liable although they happened also to be the highway authority. Commenting on that case, Lord Herschell in delivering the judgment of the Privy Council in *Municipal Council of Sydney* v. *Bourke* (2), in which the doctrine laid down in *Cowley* v. *Newmarket Local Board* (3) was affirmed and acted upon, says this : " The ratio decidendi was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair, and whether any person injured by the breach of such a duty could maintain an action. The case was not treated as one of mere non-feasance, and indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous. If any person other than the defendants had lawfully made the drain, and the same result had ensued, such person would undoubtedly have been liable to an action just as much as if he had dug a hole in or placed an obstruction on the highway, and his liability would have been the same whether the municipality were or were not bound to repair the highway. The owner of land adjoining a highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it. Why should the municipality be less liable than any other person, in respect of the same acts, merely because the road is vested in them and certain powers or duties in relation to its repair are committed to them ? " Here, the defendants, as I understand it, made a series of holes in the highway not for the purpose of maintaining the highway at all but for the purpose of inserting in those holes a number of studs. They did not take steps to see that those studs remained at all times in the position in which they had been placed. One of the studs came out, and it appears to me that the defendants are just as liable in those circumstances as though they had dug a hole in the highway and had omitted to fill it up. The act they did was not an act done in pursuance of their duties to maintain the highway but in pursuance of other duties, or rather other powers, conferred upon them by the Road Traffic Act, 1930. For those reasons, in addition to those given by Slesser L.J., I agree that this appeal fails.

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(1) 4 App. Cas. 256.
(2) [1895] A. C. 433, 441.
(3) [1892] A. C. 345.

SWIFT J. I entirely agree with the reasons which have been given in the two judgments which have been delivered, and I only wish to add this. On the one hand we have been asked to apply in this case the principle laid down in *Russell* v. *The Men of Devon* (1) and on the other hand we have been asked not to extend that principle. In my view we neither apply it nor extend it. We have nothing to do with it. The principle in *Russell* v. *The Men of Devon* (1) is that a highway authority, as such, is only responsible for the damage caused to a user of the highway by misfeasance and not by non-feasance. The present decision interferes in no way with that principle, which has been questioned more than once since 1788. How long it will be allowed to continue a principle of law of this country I do not know ; but there it is, and we do not interfere with it.

It is, however, quite clear to my mind that a highway

(1) 2 T. R. 667.

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authority can, quite apart from failure to repair the highway, be guilty of misfeasance, or may be guilty of creating a nuisance. I am satisfied on the evidence here that they did create a nuisance which damaged the plaintiff, and I think the county court judge's judgment was right. I agree that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for appellants: *William Charles Crocker.*
Solicitors for respondent: *Reid Sharman & Co.*

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Applied. Middlesex C.C. *v.* Min. of Local Government and Planning. [1951] 2 All E.R. 732.

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MARRIOTT *v.* MINISTER OF HEALTH.

Housing—Local Government—Clearance area—Compulsory purchase order—Objection by owner of part of the houses—Houses demolished by owner before public inquiry—Confirmation of order by Minister—Jurisdiction—Order in part quashed—Housing Act, 1930 (20 & 21 *Geo.* 5, *c.* 39), *s.* 1, *sub-ss.* 1, 3; *ss.* 3, 5; *s.* 11, *sub-s.* 3; *Sch. II., Part I., para.* 5.

In June, 1934, a local authority passed a resolution under s. 1 of the Housing Act, 1930, that a certain area, which included twenty-seven houses of M., should be a clearance area, and on the same day made a compulsory purchase order under s. 1, sub-s. 3, for the acquisition of the clearance area. This order required confirmation by the Minister of Health. Subsequently M. started to demolish his houses in the area and put in an objection to the order. At the date of a public local inquiry held by the direction of the Minister of Health all M.'s houses in the clearance area had been demolished and this was made known to the inspector holding the inquiry. Notwithstanding this, the Minister after receiving the inspector's report confirmed the order:—

Held, by the Court of Appeal (affirming Swift J.'s decision) that the Minister must take into consideration the facts as they existed at the date of the public inquiry and that, as no houses then remained on M.'s land to be demolished, the order must be quashed in so far as it affected that land.

Appeal from Swift J.

On June 4, 1934, the Corporation of the City of Nottingham passed a resolution declaring an area known as the James

Street area to be a clearance area under s. 1 of the Housing Act, 1930 (1), on the ground that the dwelling-houses in the area were unfit for habitation or dangerous or injurious to health and on the same day the Corporation made a compulsory purchase order called the Nottingham (S. James Street,

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(1) Housing Act, 1930, provides: " 1.—(1.) Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in the district—

(i.) that the dwelling-houses in that area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants; and

(ii.) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area,

the authority shall cause that area to be defined on a map in such a manner as to exclude from the area any building which is not unfit for habitation or dangerous or injurious to health and shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the provisions hereinafter contained. . . . ."

. . . .

(3.) So soon as may be after a local authority have declared any area to be a clearance area, they shall . . . . proceed to secure the clearance of the area in one or other of the following ways . . . .—

(i.) by ordering the demolition of the buildings in the area; or

(ii.) by purchasing the land comprised in the area and themselves undertaking, or otherwise securing the demolition of the buildings thereon."

" 3. Where as respects any area declared by them to be a clearance area a local authority determine to purchase any land comprised in the area, they may purchase also any land which is surrounded by the clearance area and the acquisition of which is reasonably necessary for the purpose of securing a cleared area of convenient shape and dimensions, and any adjoining land the acquisition of which is reasonably necessary for the satisfactory development or user of the cleared area."

" 10. (1.) Where a local authority have determined to purchase land under this Part of the Act, they may purchase that land by agreement or they may be authorised to purchase that land compulsorily by means of an order (in the Act referred to as ' a compulsory purchase order ') made and submitted to the Minister and confirmed by him in accordance with the provisions of the Second Schedule to this Act."

" 11. . . . . (3.) If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of the Act has not been complied with, he may . . . . make an application for the purpose

No. 3B) Compulsory Purchase Order, 1934, under s. 1, sub-s. 3, and s. 10 of the Act (1), for the purchase of the land included in the clearance area and of certain other land "as being land surrounded by the clearance area and reasonably necessary for the purpose of securing a cleared area of convenient shape and dimensions and being land adjoining the said clearance area the acquisition of which is reasonably necessary for the satisfactory development or user of the cleared area." This order required the confirmation of the Minister of Health.

The clearance area included twenty-seven houses belonging to John Marriott and on July 26, 1934, Mr. Marriott commenced the demolition of these houses. On July 30, 1934, the Corporation gave him notice of the above resolution and order and on August 15 he gave notice of objection to the order on the grounds (1.) that his property included in the order adjoined other valuable property of his and was required by him for developments in connection therewith; and (2.) that part of the property had already been demolished by him and he was willing to undertake the demolition of the remainder as and when the tenants could be rehoused.

On receipt of the order and objections, the Minister of Health caused a public local inquiry to be held by an inspector of the Ministry of Health, pursuant to Sch. II., para. 5 (1). This

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to the High Court . . . ."

Sch. II. Compulsory Purchase orders. Part I.

"5. If no objection is duly made by any of the persons upon whom notices are required to be served, or if all objections so made are withdrawn, the Minister may, if he thinks fit, confirm the order with or without modification, but in any other case he shall, before confirming the order, cause a public local enquiry to be held, and shall consider any objection not withdrawn and the report of the person who held the enquiry, and may then confirm the order either with or without modification: Provided that— . . . .

(iii) if the Minister is of opinion that any land included by the local authority in a clearance area ought not to have been so included, he shall in confirming the order so modify it as to exclude that land for all purposes from the clearance area; but if in any such case he is of opinion that the land may properly be purchased by the authority under section three of this Act, he shall further modify the order so as to authorise the local authority to purchase that land under the said section three and not as being land comprised in the clearance area."

(1) See note (1), p. 129, ante.

inquiry was held on October 2, 1934, and on October 8, Mr. Marriott's objection was heard. At this date no dwelling-house remained on his land and this was brought to the notice of the inspector, who also inspected the clearance area.

On January 16, 1935, the Minister after considering the scheme, the objections and the inspector's report, made an order confirming the compulsory purchase order subject to a modification excluding part of the land adjoining the clearance area.

On February 26, 1935, Mr. Marriott applied by notice of motion as a person aggrieved by the making of the order under s. 11, sub-s. 3, of the Act, asking that the order might be quashed generally or (alternatively) that so much of the order as ordered the compulsory purchase of his lands might be quashed.

Swift J. (after holding that there was nothing improper in the conduct of the inquiry) said the further ground on which Mr. Marriott sought to have the order quashed was that it was not within the powers of the Minister to confirm it so far as regards his land because at the date of the public inquiry the houses on it had all been demolished by him. He (his Lordship) thought that this contention was right for he did not see how an order made for the purpose of securing the clearance could be confirmed after the clearance had been effected. The order of the Minister was not in his view retrospective and from the moment that the houses were all pulled down he could not confirm an order under the Housing Act, 1930, compelling Mr. Marriott to part with the site previously occupied by them. The order must be quashed in so far as it affected the property of Mr. Marriott.

The Minister of Health appealed. The appeal was heard on June 22 and 24, 1936.

Sir Donald Somervell A.-G. and *Valentine Holmes* for the appellant. Swift J. was wrong in quashing the order so far as regards Mr. Marriott's land. The order was properly made by the local authority under s. 1 of the Housing Act, 1930, and that is the relevant date to which the Minister must have regard in deciding whether the order should be confirmed under s. 10 of the Act. Swift J. has disregarded the fact that the local authority are entitled under s. 5 to use the land purchased under a compulsory purchase order for a variety of purposes after the houses on the clearance area have been demolished. Further, the purchase may extend under s. 3 to land surrounded by or adjoining the clearance area. Sch. II. to the Act contains in Part I. the machinery for effecting confirmation of the local authority's order. Para. 3 (*b*) of Part I. was repealed by the Housing Act, 1935, and a new sub-paragraph substituted. The only ground on which Swift J. quashed the order under s. 11, sub-s. 3, so far as Mr. Marriott's land was concerned, was that the houses on that land had been demolished before the Minister confirmed it. If the judge's view was right, owners could always defeat the object of the Act by demolishing their houses and so preventing the local authority from having any say in the ultimate development of the property. The intention was not only that property coming within s. 1 should be demolished, but that the local authority should, if desired, have control over the subsequent development. The power of compulsory purchase is not therefore confined to the purpose of demolition: see ss. 5 and 10 of the Act. Further, Sch. II. contains no machinery enabling the Minister to ascertain facts subsequently to the public inquiry and the real object of the public inquiry directed by the Minister before he confirms the order is to ascertain that the houses in the clearance area were in fact insanitary when the order was made. The demolition of the houses by the owner was really an admission that this was so. The subject-matter of the compulsory purchase order was primarily the clearance area and that remained after the buildings on it had disappeared. The inspector's business at the public inquiry is to consider the objections to the order and report thereon to the Minister. The only order that falls to be considered is that made by the local authority, and if it was a proper order the Minister must confirm it. The appeal should therefore be allowed.

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[They referred to *Rex* v. *Minister of Health. Ex parte Davis* (1) and *Minister of Health* v. *The King.* (2)]

Montgomery K.C. and *A. Capewell* for the respondent. Confirmation by the Minister has the same purpose and no other purpose than the original making of the order, namely, the securing of the demolition of buildings on the clearance area, and the object of the Act is to secure that demolition. Here the area was cleared before the date of the public inquiry and it had ceased to be an area to which the Act applied. There could therefore be no inquiry to ascertain whether notwithstanding any objection they ought to be demolished. The provisions of ss. 4 and 5 only apply when the local authority have acquired land with a view to demolishing the buildings on it. It is true that there is power under s. 3 to acquire land surrounding or adjoining a clearance area in certain circumstances, but that has no application to Mr. Marriott's land, which is included by the local authority's order in the clearance area: see *Errington* v. *Minister of Health* (3).

The local authority had power under s. 1 after the declaration of a clearance area either to make an order on the owners to demolish the buildings on the area or to make a compulsory purchase order for the purposes of effecting the demolition. If an order for demolition had been made the Minister could not have confirmed it when it had been ascertained at the public inquiry that the houses had already been demolished. The same considerations must apply to the compulsory order, with the result that the Minister's decision to confirm the order cannot be a valid judicial decision but is ultra vires. So too when part of the clearance area has been rendered free of houses, that part must be excluded from the order. The Minister has power to modify the order under para. 5 of Sch. II., Part I.

[ROMER L.J. Proviso (iii.) to that paragraph seems to cause a difficulty.]

That proviso is dealing with special land which, when the

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(1) [1929] 1 K. B. 619.
(2) [1931] A. C. 494.
(3) [1935] 1 K. B. 249.

Minister has excluded it from the clearance area, can be included by him in land to be purchased under s. 3 as land surrounded by or adjoining the clearance area. The proviso does not cut down the general power of modification conferred on the Minister by para. 5. It is true that the proviso provides that: "If the Minister is of opinion that any land included by the local authority in a clearance area ought not to have been so included, he shall in confirming the order so modify it as to exclude that land for all purposes from the clearance area"; and that might seem at first sight to restrict the power of modification to cases where land was included in the original order which on the facts then in existence ought not to have been so included. It is not suggested that this is so here. But that proviso must be read in its entirety and it goes on to enable the Minister to include that excluded land in land to be purchased under s. 3. This shows the limited object of proviso (iii.) and that it is not directed to restricting the power of modification conferred in the body of para. 5. Proviso (iii.) relates only to a limited part of the Minister's general power of modification and confers an additional power in regard to that part. It does not cut down the general power.

It is said that no machinery is provided by which the Minister can inform himself of the facts at the time when the matter comes before him for confirmation. But here the buildings on Mr. Marriott's land had already been demolished when the public inquiry was being held and the Minister could learn this from the inspector by whom it must have been reported. But in any case the Minister's confirmation must be made in the light of the existing facts.

Sir Donald Somervell A.-G. in reply. Proviso (iii.) to para. 5 is a limiting proviso restricting to the extent thereby provided the Minister's power to modify an order submitted to him for confirmation. The object of para. 5 is less to confer a power of modification than to restrict it. Proviso (iii.) relates to a case where the Minister has no discretion but must exclude land as having been improperly included in the order by the local authority; but even then it goes on to empower the

Minister to include that land in the compulsory purchase order when it comes within s. 3. Proviso (iii.) lends support to the view that the Minister is entitled and indeed required to proceed on the facts as they existed when the local authority made the order submitted for confirmation. Under proviso (iii.) he is required to do so and he is at least entitled to do so in a case not within the proviso. It is for the respondent to show that the Minister is bound to have regard to the subsequent facts and in that it is submitted that he has failed. As already pointed out no machinery is provided for enabling the Minister to inform himself of the subsequent facts. All the Minister is entitled to look at is the order, the objections thereto and the inspector's report. Swift J. decided the case on the ground that the Minister had to take into consideration the facts as they existed when the matter came before him. It is clearly not so. There is no power to go outside the inspector's report, which is final in regard to the matters there dealt with. It may be that the Minister can consider matters not touched by the report such as the financial ability of the local authority to carry out a scheme and the ability to provide alternative accommodation, but so far as the inquiry goes the report is final.

[SLESSER L.J. When there are no objections to an order the Minister can modify it without a public inquiry.]

That may be so, but any objections are dealt with by the inspector's report and the Minister has no right to inform himself elsewhere as to them : *Errington's* case. (1)

SLESSER L.J. This appeal by the Minister of Health from a judgment of Swift J. raises a question which is undoubtedly of importance, relating to the proper construction of certain sections of the Housing Act, 1930. The decision may considerably affect the powers of local authorities to deal with insanitary areas in their districts. Whatever may have been the purpose of the Legislature in passing this Act and other ameliorative Acts, we have to interpret the law as we find it, and it may well be that there

(1) [1935] 1 K. B. 249.

has been omitted from the Housing Act, 1930, power to deal with certain contingencies such as that which has arisen in the present case.

[His Lordship stated the facts and read the relevant sections of the Act.]

The matter came before Swift J., who made an order quashing the order of the Minister in so far as it affects the property of Mr. Marriott. It is from that judgment that this appeal is brought.

Mr. Montgomery does not seek to impeach the order made by the local authority. He concedes that on June 4, 1934, when the local authority made their order, the facts which gave them power to make it existed. They were entitled by resolution to declare that Mr. Marriott's property was insanitary. They were entitled, in the absence of agreement (and he concedes that there was no agreement) to seek a compulsory purchase order. But he says that, owing to the fact that Mr. Marriott had demolished his property before the time of the inquiry which the Minister caused to be held on October 8, there was then and thereafter no property on which the Minister could exercise his power by confirming the order. He says that the foundation of the powers both of the Minister and of the local authority—being, as stated in s. 1, that there are buildings unfit for human habitation or dangerous or injurious to health—was lacking as regards Mr. Marriott's property at the time of the inquiry by the inspector and at the time of the confirmation by the Minister, and that it avails the Minister nothing that the order had reference to buildings unfit for habitation or otherwise falling within the section at the time when the local authority acted.

On the other hand, the Attorney-General argues that, as it is conceded that the original order by the local authority was properly made, the Minister had power to confirm that order; and he points out (and there is great force in his argument) the inconveniences which arise from any other view. For example, it is clear that in the present case the area which is the subject of the order is considerably larger than the property of Mr. Marriott; and in such a case there is or may be the question of an exercise of powers under s. 3 for the purchase of adjoining property. He reminds us that whereas formerly the powers of a local authority when they compulsorily acquired an area of land were limited to building houses on that area in place of the demolished ones—as was decided in *Rex* v. *Minister of Health* (1)—s. 5 of the Act of 1930 now authorizes a local authority thereafter to sell or let the land and to deal with it in various ways to them seeming proper. And he points out that Mr. Marriott, by demolishing the houses, if Mr. Montgomery's view is right, has interfered with the powers of the local authority which are deemed necessary in the public interest, and that the Act can never have intended such a state of affairs to have arisen on these facts. However that may be, Mr. Marriott is concerned only for his own property, and it is with regard to his property that I consider this matter. In my view Mr. Montgomery is right in his contention that the Minister had not before him the necessary material on which he could properly confirm the order of the local authority.

I am not concerned in this case to consider by what means the Minister might or might not inform himself of the condition of affairs otherwise than through the public local inquiry. Our attention has been called to *Errington* v. *Minister of Health.* (2) But I do not think it necessary here to consider the question in that case having regard to the facts of this case—namely, that the Minister considered nothing other than that which had been learned at the public local inquiry when the inspector was apprised of the fact that Mr. Marriott's property had all been demolished. It is not necessary, therefore, to impute to the Minister any further knowledge than that which he gained through his inspector at the public local inquiry. I think it impossible to say that, having that knowledge and that information, he could have confirmed this order, and for the following reason. I have already pointed out that under the Act it is necessary for the local authority, that their order may be operative, to obtain its confirmation by the Minister in accordance with the provisions of the

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Second Schedule. That Schedule contemplates in para. 5 of Part I. that the Minister may, if he thinks fit, confirm the order, with or without modification, and, subject to certain questions which arise on a proviso to that paragraph, I think that those words indicate that in modifying the order he must be taken to have regard at any rate to the matters which have appeared at the public local inquiry, for if the modification is to extend to the exclusion of any particular house or part of the area, or if the Minister may even refuse to confirm at all, there must be some information on which his jurisdiction can be based. It will be remembered that in s. 1 of the Act it was expressly provided that the area defined on the map should be defined in such a manner as to exclude from the area any building which was not unfit for human habitation or dangerous or injurious to health. The Minister also is given power expressly by proviso (iii.) to para. 5 of the Second Schedule, Part I., to deal with that matter in considering whether he will confirm or modify the order. The proviso begins with these words: "If the Minister is of opinion that any land included by the local authority in a clearance area ought not to have been so included, he shall in confirming the order so modify it as to exclude that land for all purposes from the clearance area." It has been suggested as a possible view that para. 5 confers a power to modify by reference only to the facts as they were at the time when the local authority made the order, and that the Minister's power to exclude land is limited by what is contained in proviso (iii.), so that his general powers of modification under para. 5 are to be limited to dealing with the order on the facts which existed at the time when the local authority made that order. I cannot so read the language. I think that the words in proviso (iii.) are inserted in relation to what then follows, that is to say, "but if in any such case he is of opinion that the land may properly be purchased by the authority under section three of this Act, he shall further modify the order so as to authorize the local authority to purchase that land under the said section three and not as being land comprised in the clearance area." Thus, having modified the order by excluding certain land from the insanitary area, the clearance area, he may nevertheless, if he thinks it is right, permit the local authority to treat it as land to be bought under s. 3 as being land not in but surrounded by, or adjoining, the clearance area, in which case different provisions and different considerations may arise. For example, that land very likely would be land which was not in an insanitary state, but would merely be purchased to secure a cleared area of convenient shape and dimensions ; and different questions of compensation and the like might arise. But I find it quite impossible to read proviso (iii.) as limiting the Minister's power to modify the order under the opening words of para. 5, when it is giving him an extended power, with regard to certain land excluded by him from the clearance area, to authorize its purchase under s. 3 although the authority have not themselves sought that power. That that extended power was necessary is shown by proviso (ii.), which says that : " The order as confirmed by the Minister shall not (*a*) authorize the local authority to purchase compulsorily any land which the order would not have authorized them so to purchase if it had been confirmed without modification." It was therefore necessary that express power should be given to the Minister to order the purchase under s. 3 of land excluded by him from the clearance area, otherwise he would find himself deprived of that power by proviso (ii.) (*a*), because the local authority had not originally sought the right so to do.

I come back therefore to the view which I intimated at an earlier stage of my judgment—that the Minister may modify the order as he thinks fit, subject to the limitation that he cannot authorize the purchase of that which the local authority did not seek to acquire otherwise than in accordance with proviso (iii.). The result is that in deciding whether to modify the order he may take into consideration matters as they were at the time of the local inquiry. At that time there were in the present case no houses at all on Mr. Marriott's land. The Attorney-General appeared to concede that, if between the date of the declaratory resolution by the local authority and the time when they proposed to make their order the

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houses had been demolished, the local authority could not have made an order including Mr. Marriott's land in the clearance area, although that land had been properly included in the declaratory resolution. It seems to me that that is a right conclusion to come to, because it is clear that they could not order the demolition of the buildings on Mr. Marriott's land if they decided to proceed by process of demolition rather than by purchase, because ex hypothesi there would be no buildings on the land to be demolished. Similarly, I do not think that they could make a compulsory purchase order of the land as such an order must be for the purpose of securing the demolition of the buildings thereon, and there would be no such buildings to be demolished.

The same considerations which lead them to decide on the form of their order, more particularly the requirement that they shall exclude from their order buildings which are not unfit for human habitation, seem to me to apply equally to the modification and confirmation by the Minister. The whole substratum of the Act, so far as it is here relevant, contemplates the presence of buildings proper to be demolished. Where there are no buildings there can be no scope for the operation of the order.

For these reasons I have come to the conclusion that, whatever may be the limitations which the Act imposes on the powers of the local authority—powers which I have no doubt they have sought to exercise entirely bona fide and in the interests of the social amenities of Nottingham—the fact that there was on Mr. Marriott's land no subject-matter on which the Act could operate at the time of the inquiry prevented the Minister from confirming the order in so far as it affected that land. In those circumstances it seems to me that the appeal must fail.

As regards the Attorney-General's contention that there is no means under the Act by which the Minister can apprise himself of changes in the situation between the date of the local inquiry and the time when he seeks to act, it is enough to say here that at the date of the local inquiry, held for the purpose of transmitting the facts to him, the situation which we have considered in the present case had already come into existence, and therefore the difficult problem which the Attorney-General raised need not be considered.

ROMER L.J. The question which this Court has to determine on this appeal relates to the proper construction of Part I. of the Housing Act, 1930. The question is whether, when an order made by a local authority, whether it be a clearance order or a compulsory purchase order, comes before the Minister for confirmation, he must take into account in those cases where objection has been raised to the order merely the circumstances as they existed at the date when the local authority made the order, or the circumstances as they exist at the time of the public local inquiry.

There is very little in the Act itself to throw light on the solution of that question, but on the whole I have arrived at the conclusion that the learned judge was right in adopting the latter view and in holding that, where the circumstances as they existed or are shown to have existed at the date of the public local inquiry are such that the local authority would at that time have had no jurisdiction to make the order, the Minister of Health himself is unable to confirm the order. It must be remembered, I think, that the object of this Act is to enable the local authority to enforce the clearance of unhealthy areas. That is the primary object of the Act, and the fact that, in the course of exercising those powers, they may become possessed of land which they can sell under s. 5 of the Act, or which they can appropriate for any purpose for which they are authorized to acquire land, does not appear to me to throw any light on the matter which we have to decide. Prima facie, therefore, when, on a clearance order or compulsory purchase order made by the local authority coming up before the Minister of Health for confirmation, there is no clearance to be effected in an unhealthy area, the order should not be confirmed. I think, too, that the fact which has been referred to by Slesser L.J. that the Minister is given power in terms to confirm the order with or without modification, does strongly indicate that the

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Minister must consider the facts which are brought to his knowledge as a result of the public local inquiry.

There are to be found in the Second Schedule, Part I., para. 5, certain words which have caused me some little difficulty and which I think do afford some ground, certainly at first sight, for the contention that the Minister of Health has to regard the facts, not as they exist when he is considering the matter, but as they existed when the matter was being considered by the local authority. The words are to be found in proviso (iii.) to para. 5, and are in these terms: "If the Minister is of opinion that any land included by the local authority in a clearance area ought not to have been so included, he shall in confirming the order so modify it as to exclude that land." These words seem at first sight to indicate that the Minister has nothing to do with the question whether, by reason of a change of circumstances since the local authority took the matter in hand, the particular land would not, if the order were then being made, be included in the order or the area, I think, however, that there is an answer to the contention based on these words. It is admitted by the Attorney-General that if, after the local authority have declared the existence of the clearance area under s. 1 of the Act, the circumstances have changed, say, by the pulling down of the buildings on the area, so that there is no longer any object in making a clearance order or a compulsory purchase order, the local authority should not make such an order. And it will be observed that proviso (iii.) of para. 5 is only dealing with the question whether particular land ought to have been included by the local authority in a clearance area, and is not dealing with the question whether the land, although properly included in the clearance area, ought not to have been included in the compulsory purchase order. If the words of proviso (iii.) are to be treated as limiting by implication the powers of the Minister it would follow that, if he found that land had been properly included in the clearance area but, by reason of its having been cleared in the meantime, it had been improperly included in the compulsory purchase order, he would have no

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power to interfere. That cannot be right. If the Minister of Health were to find that land, though properly included in a clearance area when the resolution establishing that area was passed, had been, owing to a change of circumstances, improperly included in the order of the local authority, it would be his bounden duty to refuse to confirm the order in view of the admission which the Attorney-General has made.

I think, further, that an answer to the contention based on this proviso is to be found in the consideration to which Slesser L.J. has called attention. If land has been included in the clearance area which ought not to have been included because it did not come, say, within the words of s. 1 of the Act, or did not satisfy the conditions laid down by s. 1, the Minister obviously must exclude it from the compulsory purchase order, and it did not require the express words of a proviso to give him such a power as that. Therefore I think that we must look at the words which follow in the proviso for the purpose of seeing what was the object of the Legislature in inserting the proviso. And I think one finds that the object was to provide that, in such a case as the one which is mentioned in the first part of the proviso, the Minister, though excluding certain land from the compulsory purchase order so far as it related to land in the clearance area, might let the order operate on it as being land adjoining a clearance area under s. 3 of the Act.

On the whole, I have come to the conclusion that the learned judge was right, and that this appeal should be dismissed.

EVE J. I have come to the same conclusion, and have nothing to add.

Leave to appeal to the House of Lords was granted on the condition that the Crown paid Mr. Marriott's costs of the appeal in any event.

Appeal dismissed.

Solicitors: *Solicitor to Ministry of Health; Torr & Co., for J. A. Simpson, Coulby & Drabble, Nottingham.*

H. C. G.

1936
May 10.

REX *v.* WANDSWORTH LICENSING JUSTICES.

Ex parte ROGERS.

Licensing—Permitted hours—Variation—Order for, at adjourned meeting of licensing justices—Adjourned meeting not held within one month of general annual licensing meeting—Validity of order—Whether in respect of new business or continuation of former business—"Proposal" to vary order—Licensing (*Consolidation*) *Act,* 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 10—*Licensing Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 42), *s.* 12, *sub-ss.* 1, 2 (*b*)—*Licensing Rules,* 1921, *rr.* 4, 5.

The Licensing (Consolidation) Act, 1910, s. 10, provides: "(4.) Every . . . . adjourned meeting shall be deemed to be a continuation of the general annual licensing meeting, and shall be held within one month from the date of the original meeting . . . ."

The Licensing Act, 1921, s. 12, provides: "(1.) The powers of licensing justices" under Part I of the Act relating (inter alia) to permitted hours "may be exercised by them, in accordance with such procedure as may be prescribed by Rules made by the Secretary of State, at their general annual licensing meeting . . . . (2.) Subject to the provisions of this Act, and of the Licensing (Consolidation) Act, 1910, an order of licensing justices under this Part of this Act— . . . . (*b*) may be varied by a subsequent order; . . . ."

The Licensing Rules, 1921, provide: "4. Where it is intended to consider any proposal to make or vary any order" relating (inter alia) to permitted hours "the clerk to the justices shall cause a notice thereof . . . . to be published . . . . 5. Upon the consideration of any proposal . . . . the justices shall take such steps as seem to them fit for the purpose of ascertaining local opinion . . . ."

On February 7, 1936, licensing justices held their general annual licensing meeting at which they decided provisionally not to vary the permitted hours, and adjourned that meeting to March 6, 1936. On March 3, 1936, the justices were informed by their clerk that at the adjourned meeting an application would be made, on behalf of persons interested, to re-open the question of permitted hours on the ground that the position of licensees in the division had become acute because an adjoining division had adopted a later terminal hour. On March 6, 1936, the adjourned meeting was held, when the said application was made to the justices, who considered the desirability of re-opening the question, decided that in the altered circumstances it was in the public interest to ascertain public opinion in the district, and, being unable to do more until notice had been published, further adjourned the meeting to March 20, 1936. On March 20, 1936, due notice thereof having been given, the second adjourned meeting was held at which the justices, after hearing persons as to local opinion, made an order that the permitted hours should be varied as therein specified :—

Held, that, on the true construction of the enactments and rules and in the circumstances above stated, the order of the justices varying the hours was valid, inasmuch as,

(1) at the adjourned meeting held on March 6, 1936, within one month of the original meeting, the justices had gone so far as to consider a proposal to vary an order within the meaning of these words in r. 4;

(2) the justices, having begun to consider that proposal at an adjourned meeting held within one month of the original meeting, and being unable to deal with it fully at that meeting, were entitled to adjourn the meeting further for the consideration of the same proposal, as distinct from any new business, to March 20, 1936, though that date was not within one month from the date of the original meeting.

Rex v. *Bristol Justices* (1903) 89 L. T. 474 ; 67 J. P. 375, applied.

Order nisi for a certiorari.

On February 7, 1936, the licensing justices for the Wandsworth Division of the county of London held their general annual licensing meeting, at the Battersea Town Hall, at which they decided provisionally not to vary the permitted hours for the division for the ensuing twelve months, and adjourned that meeting to March 6, 1936.

A letter dated March 2, 1936, was written and sent by the solicitors for the South-West London Licensed Victuallers' Trade Protection Association to the clerk to the justices, Mr. Thomas Baines, stating that they were instructed by their clients " to apply to the Wandsworth licensing justices at their sitting on Friday next (March 6) to advertise and reopen the question of permitted hours for the Wandsworth licensing division," and that an application would be made accordingly. The letter further stated that the position of individual licensees in the division had become acute and that of the public disadvantageous because adjoining divisions had now a later terminal hour.

The clerk to the justices having received that letter thereupon caused a circular dated March 3, 1936, to be sent to all the licensing justices for the division, mentioning that he had received that letter from the solicitors of the said association requesting these justices to re-open the question of the permitted hours, and informing them that at the adjourned annual licensing meeting on March 6 the justices would be asked to decide whether the matter should be reopened.

On March 6, 1936, the justices held their adjourned general annual licensing meeting, at which they considered the desirability of reopening the question of permitted hours in the division and decided that in the altered circumstances which then prevailed it was in the public interest that the appropriate means should be taken to ascertain public opinion upon the matter and so announced their decision in open court, and further adjourned the general annual licensing meeting to March 20 for that purpose.

The clerk to the justices caused the statutory notice to be published that the second adjourned general annual licensing meeting would be held on March 20, 1936, and that at that meeting a proposal would be considered for modifying in accordance with the Licensing Act, 1921, s. 1, sub-s. 2, and s. 2, sub-s. 2, the permitted hours for licensed premises in the district.

On March 20, 1936, the second adjourned meeting was held, at which the justices, after having fully heard all the parties who appeared and desired to be heard, and the arguments on both sides, came to the conclusion that the public interest would be better served by the permitted hours on week-days being varied from 5 P.M. to 10 P.M. to 5.30 P.M. to 10.30 P.M. The justices, accordingly, thereupon made an order that the permitted hours formerly fixed by them in February, 1929, should be rescinded, and that as respected licensed premises in the division the permitted hours on week-days should be between 11 A.M. and 3 P.M. and between 5.30 P.M. and 10.30 P.M., and on Sundays, Christmas Day, and Good Friday between 12 NOON and 2 P.M., and between 7 P.M. and 10 P.M.

On April 2, 1936, an order nisi was made on the application of the Rev. F. C. Rogers, the minister of a Congregational church in the division calling upon the justices to show cause why a writ of certiorari should not issue to remove into the High Court the order made by them on March 20, 1936, on the grounds: (1.) Want of jurisdiction in that the order was passed at what purported to be an adjourned general annual licensing meeting not held within one month of the date of the original meeting. (2.) That the justices had acted upon and taken into account matters irrelevant for their consideration. (3.) That the justices had failed to take into account matters which it was their duty to take into account.

Notice of the order nisi to be given to the justices and to the above mentioned association.

The application for the order nisi had been supported by an affidavit of the applicant in which he stated (inter alia) that the whole of the licensing business for the division to be transacted at the general annual licensing meeting and any adjournment thereof was dealt with at the meetings held on February 7 and March 6, 1936, and that no business was left outstanding after March 6, 1936; that the grounds on which the justices purported to act was the alteration in permitted hours by the Newington justices in the adjoining Newington district, and that the justices in so doing had acted upon extraneous and irrelevant circumstances; and that the applicant as a ratepayer objected to the justices altering the hours at the behest of the licensing trade.

An affidavit in reply made by Mr. E. S. Strange, one of the justices for the Wandsworth division, with the authority of his fellow justices, was now read in which he stated the facts above mentioned relating to the proceedings of the justices, including in particular the proceedings at the meeting of the justices on March 6, and further stated that it was not accurate to say that no business was left outstanding after March 6 as it was not possible to consider the question of the variation of the permitted hours on that day; that the ground upon which the justices acted was not the alteration in hours in the Newington division; that the justices acted on what appeared to them to be public opinion in the division and not at the behest of the licensing trade as alleged; that the justices heard in support of the application the representatives of a large number of licensees in their division who appeared to them to be in a position to know what the requirements of the public using licensed houses in the division were, and also representatives of the Battersea chamber of commerce and the Wandsworth chamber of commerce representing a number of traders in the division, and at least three representatives of the opposition ; and that they heard the arguments on both sides fully and at length and gave them careful consideration, and having done so they came to the conclusion that public opinion showed that the public interest would be better served by the permitted hours on week-days being varied from 5 P.M. to 10 P.M. to 5.30 P.M. to 10.30 P.M.

Montgomery K.C. and *Christmas Humphreys*, for the South-West London Licensed Victuallers' Trade Protection Association, showed cause.

The order nisi for a writ of certiorari to remove into this Court the order made by the justices on March 20, 1936, varying the permitted hours should be discharged. The order of the justices purports to have been made under certain Acts, and in order to ascertain whether any of the grounds for removing it can be supported it will be convenient in the first place to consider the relevant provisions of these Acts. The Licensing (Consolidation) Act, 1910, provides by s. 10, sub-s. 4, that every adjourned meeting of the licensing justices shall be deemed to be a continuation of the general annual licensing meeting, and shall be held within one month from the date of the original meeting ; and by s. 16, sub-s. 4, that the justices may adjourn the consideration of the renewal of a licence to a future day fixed by them, whether more or less than one month from the date of the original general annual licensing meeting. The Licensing Act, 1921, provides by ss. 1 and 2 that the number and outside limits of the permitted hours each day shall be as there specified, and subject thereto as fixed by order of the justices ; by s. 12 that (sub-s. 1) the powers of licensing justices in regard to permitted hours may be exercised by them, in accordance with such procedure as may be prescribed by Rules, made by the Secretary of State, at their general annual licensing meeting, and (sub-s. 2) subject to the provisions of the Acts an order of the justices under the Act may be varied by a subsequent order ; and by s. 22 that the Act is to be construed along with the Act of 1910. The Licensing Rules, 1921, made under the latter Act, provide by r. 4 that where it is intended to consider any proposal to make or vary any order of the justices fixing (inter alia) the permitted hours on week-days the clerk to the justices shall cause a notice thereof to be published in two local newspapers, and in such further manner as the justices may direct; and by r. 5 that upon the consideration of any such proposal the justices shall take such steps as seem to them fit for the purpose of ascertaining local opinion with respect to the matter in hand, and shall allow any person to address them who appears to be qualified to give expression to any such opinion. On the true construction of these various provisions, when at an adjourned meeting of the justices held within a month of the original meeting, a proposal to vary an order fixing the permitted hours has been examined by the justices so far as to enable them to determine whether they intend to consider it, they have begun to consider it and have given themselves jurisdiction to continue to consider it. Further, on the construction of these provisions, if the justices find that they cannot otherwise fully deal with the proposal, they may, on giving reasonable notice of it, and, if they think fit, taking steps to ascertain local opinion with respect to it, postpone the consideration thereof to a later adjourned meeting to be held even more than a month after the original meeting. There is no suggestion in the rules that, if the proposal cannot be finally disposed of at an adjourned meeting held within the month, it cannot be further dealt with until the next general annual licensing meeting nearly a year afterwards. In the present case the justices at their general annual licensing meeting on February 7, 1936, made an order fixing the permitted hours and adjourned the meeting to March 6, 1936, which was within a month of the original meeting. At the adjourned meeting on the latter date the proposal in question to vary the permitted hours on the ground that an adjoining district had different permitted hours came before the justices, who took account of it, but, in order that notice might be given of it and that local opinion might be ascertained

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regarding it, postponed the consideration of it to a further adjourned meeting to be held on March 20, 1936, which was not within a month of the original meeting. At the meeting on March 6 the proposal was fully before the minds of the justices, but they did not then dispose of it because they thought it desirable in the public interest that local opinion should first be known. At the meeting on March 20 they further considered the proposal and disposed of it by making the order in question altering their original order. That last meeting was a continuation of the meeting of March 6, and as the order in question would have been in time and valid if made at that earlier meeting, it was equally valid at the later meeting after the end of the month. Licensing justices have power to adjourn specific cases beyond the month when there is not enough time to dispose of them at the adjourned meeting within the month: *Rex* v. *Bristol Justices.* (1) Another contention on behalf of the applicant on the application for the order nisi was that an order of licensing justices cannot be varied twice in one year. That contention had not been urged before the justices and it is not supported by any provision of the Acts or by any decided case.

Harold Murphy K.C. and *Sidney Lamb*, for the Wandsworth licensing justices, showed cause. The only point argued before the justices was whether they had power to make the order at the adjourned meeting on March 20 which was not held within one month from the date of the original meeting. For the reasons already mentioned they had power to do so. The question whether the justices had considered the proposal at the meeting on March 6 was not raised before the justices and should not be raised here. The effect of setting aside the order of the justices would not be to curtail the permitted hours in the Wandsworth district, but merely to vary them and to re-establish inconsistency between the hours in that district and adjoining districts. The justices in adjourning the meeting to March 20 in order to ascertain local opinion acted in accordance with their public duty.

(1) 89 L. T. 474; 67 J. P. 375.

F. J. Tucker K.C. and *Astell Burt* for the applicant in support of the order nisi. The order nisi should be made absolute for a writ of certiorari to remove into this Court the order made by the licensing justices on March 20, 1936, purporting to vary the permitted hours. The order of the justices purports to have been made under the Licensing Act, 1921, which is to be construed along with the Licensing (Consolidation) Act, 1910, and under the Licensing Rules, 1921. The relevant provisions of these Acts and Rules have already been referred to, and it is submitted that on their true construction the order of the justices was made without jurisdiction. One reason why the order of the justices was made without jurisdiction is that it was made at an adjourned meeting of the justices which was not held within the statutory period for the holding of such a meeting. The Act of 1910, s. 10, sub-s. 4, provides generally that every adjourned meeting of the licensing justices shall be held within one month from the date of the original general annual licensing meeting. That provision is not merely directory but imperative, and licensing justices have no power to adjourn the hearing of an application to a day subsequent to the end of the statutory period in the absence of some particular statutory provision or authority enabling them to do so: see Halsbury's Laws of England, 2nd ed., vol. 19, p. 26. There is no provision in the Acts and no authority which enables the justices to adjourn the hearing of a proposal to vary the statutory hours to a day beyond the end of the statutory period. The Act of 1910, s. 16, sub-s. 4, provides that the licensing justices may adjourn the consideration of the renewal of a licence to a future day fixed by them whether more or less than one month from the date of the original meeting, but that provision relates only to the consideration of the renewal of a licence and has no application to the consideration of a proposal such as this to vary the statutory hours. In the present case the general annual licensing meeting was held on February 7, 1936, the adjourned meeting at which the justices had to, and did, signify whether they intended to consider the proposal was held on March 6, 1936, which was within one month from the date of the original meeting, but the further adjourned meeting at which the justices purported to consider the proposal and to make the order in question in regard to it was not held till March 20, 1936, which was not within one month from the date of the original meeting. Consequently, the order of the justices having been made at a meeting held more than a month from the date of the original meeting was on that ground made without jurisdiction and should be set aside. If in such a case as this the licensing justices have any power to adjourn the general annual licensing meeting to a date which is not within one month from the date of the original meeting, they have only power to do so where they have not enough time to dispose of the case at an adjourned meeting within the month: *Rex* v. *Bristol Justices* (1); and see *Reg.* v. *County of London Justices* (2); and a second reason why the order made by the justices on March 20, 1936, after the end of the month, was made without jurisdiction is that it was not on the ground that they had not time to dispose of the matter at the meeting within the month that the justices adjourned the meeting to that date. Further, if the justices have any power to adjourn the general annual licensing meeting to a date which is not within the month, they have only power to do so for the purpose of continuing the consideration of a matter which was before them at an adjourned meeting held within the month, and a third reason why the order made by the justices on March 20, 1936, after the end of the month, was made without jurisdiction is that the consideration of the proposal to alter the permitted hours was not before the justices at the meeting held on March 6, or at any other meeting held within the month. This appears from the relevant provisions, and in particular from the Licensing Rules, 1921, rr. 4 and 5. These mean that when a proposal to vary an order fixing the permitted hours comes before the justices at a meeting, all that they can do at that meeting is to indicate whether they intend to consider the proposal, and, if they do so intend, then to cause a notice of the proposal to be published as there directed. They cannot consider the proposal at that meeting because they cannot do so until after notice of it has been published. They have only a preliminary point before them at that meeting and cannot deal with the merits. They can only consider the proposal at the subsequent adjourned meeting appointed to be held after the notice has been published, and upon consideration of it they are to take such steps as seem to them fit for ascertaining local opinion with respect to the matter. Here, when the proposal came before the justices at their adjourned general annual licensing meeting on March 6, the justices, instead of following the procedure prescribed by the rules, purported then and there to consider the proposal by having regard to the desirability of re-opening the question of the permitted hours, and to decide that means should be taken to ascertain public opinion, and they also purported to adjourn the general annual licensing meeting to March 20 for the purpose of further considering the proposal. The consideration of the proposal could not come before the latter meeting, which was not held within the month, unless it had been before the former meeting within the month. There was nothing before the justices at any meeting within the month which they could adjourn for consideration to a meeting outside the month. It is well settled that the licensing justices have no power further to adjourn the general annual licensing meeting to be held more than a month from the date of the original meeting for the purpose of dealing with fresh business which was not before a meeting held within the month, but have only power to do so for the purpose of continuing the consideration of the same business which was before the earlier meeting: *Rex* v. *Groom* (1); *Rex* v. *Bristol Justices* (2); and *Reg.* v. *Anglesea Justices.* (3)

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(1) 89 L. T. 474; 67 J. P. 375.

(2) [1893] 2 Q. B. 476.

LORD HEWART C.J. This is a rule nisi for a writ of certiorari to remove into this Court a certain order made by the licensing justices for the Wandsworth division of the county of London at a meeting on or about March 20 last, purporting to vary, pursuant to the Licensing Act, 1921, the permitted hours for that division. The rule nisi was granted upon three grounds. But the only one that is now persisted in is ground No. 1, which is in these terms: "Want of jurisdiction, in that the said order was passed at what purported to be an adjourned general annual licensing meeting not held within one month of the date of the original meeting."

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(1) [1901] 2 K. B. 157.

(2) 89 L. T. 474; 67 J. P. 375.

(3) (1895) 65 L. J. M. C. 12.

It is a little important in this case to see first of all what the facts are. The reverend gentleman upon whose motion the rule was granted sets out in his affidavit that on February 7 last these licensing justices held their general annual licensing meeting at the Battersea town hall, and then and there decided not to vary the permitted hours for the division for the ensuing 12 months. But that meeting was adjourned to March 6 last. To see what happened on that occasion, I will refer to the affidavit sworn by Mr. Strange, one of the justices, with their authority. After the adjournment to March 6, but before that date, a letter was received from the solicitor to the South-West London Licensed Victuallers' Trade Protection Association, who wrote that they were instructed to apply to the justices at their sitting on the then ensuing March 6 to advertise and reopen the question of permitted hours for the Wandsworth licensing division. That letter was received, according to the justices' affidavit, on March 3 last; and thereupon the clerk to the justices, Mr. Thomas Baines, caused a circular letter to be sent to all licensing justices for the division directing their attention to the fact that a request had been made for the question of the permitted hours to be re-opened and informing them that on March 6 at their adjourned general annual licensing meeting they would be called upon to decide whether the matter should be re-opened. According to this affidavit on March 6 the justices met and considered the desirability of re-opening the question of permitted hours in this division, and decided that in the altered circumstances which then prevailed it was in the public interest that the appropriate means should be taken to ascertain public opinion upon the matter, and so announced their decision in open Court and further adjourned the general annual licensing meeting to March 20 for that purpose. It is said in the affidavit in support of this rule that the whole of the licensing business transacted at the general annual licensing meeting and any adjournment thereof was dealt with at the meetings held on February 7, 1936, and March 6, 1936; and that no business was left outstanding after March 6, 1936. But that is not the view of the facts which these justices take. According to the affidavit of Mr. Strange, it is not accurate to say that no business was left outstanding after March 6, as it was not possible to consider the question of the variation of the permitted hours on that day. What followed? The statutory notice of the adjourned meeting on March 20 was duly published; and at the meeting on that date the matter was fully heard. The justices set out in their affidavit the course which they adopted. They heard in support of the application the representatives of a large number of licensees in their division who appeared to them to be in a position to know what the requirements of the public using licensed houses in the division were, and also representatives of the Battersea chamber of commerce and the Wandsworth chamber of commerce representing a number of traders in the division, and at least three representatives of the opposition. They heard the arguments on both sides fully and at length, gave them careful consideration, and having done so they came to the conclusion that public opinion showed that the public interest would be better served by the permitted hours on week-days being varied from 5 P.M. to 10 P.M. to 5.30 P.M. to 10.30 P.M.

In those circumstances it is said that these justices had no jurisdiction to make the order which they made for the reason that this adjourned licensing meeting at which the order was made was not held within one month of the date of the original meeting. The sequence of events is perfectly plain. The general annual licensing meeting was held on February 7, 1936. A preliminary decision was then reached; but that meeting was adjourned to March 6. On March 6 the letter from the solicitors to the Licensed Victuallers' Association, which the clerk to the justices had very properly brought to the notice of all the justices, came up for discussion. It is quite true that the Rules made under the Licensing Act, 1921, use the word "proposal", r. 4 providing that "where it is intended to consider any proposal to make or vary any order" certain procedure shall be followed. It is contended by the applicant that there was no proposal before the justices at their meeting on March 6. I am utterly unable to draw a distinction between that which was done at that meeting and the making of a proposal. A letter was written by solicitors in which they stated that they were instructed to apply to the justices at that meeting to advertise and re-open the question of permitted hours. It went on to say that the position of individual licensees of the Wandsworth division had become acute, and it used arguments in favour of the course of re-opening the question. If that was not a proposal, I cannot imagine what it was. That proposal was circulated to the justices before March 6. When, therefore, they met at their adjourned meeting on March 6, as to which there is no controversy that it was duly and properly adjourned from February 7, that document was before them. What did they do? Is not it apparent that they proceeded, as far as they could, to consider it? The justices say, and there is not the slightest reason why their word should not be literally accepted, that they met and considered the desirability of re-opening the question of the permitted hours in the division. Nay more, they came to a decision. They decided that, in the altered circumstances which then prevailed, it was in the public interest that the appropriate means should be taken to ascertain public opinion. In other words, having taken this proposal into their consideration, they decided that in order to make that consideration adequate there must be a further adjournment, and that steps should be taken to see what the public really wanted. That being so, it seems to me that what happened on March 20 was a continuation of the consideration which began on March 6.

It is said in support of the rule that the only powers of licensing justices in this matter are to be found in the Licensing Act, 1921. Sect. 12 of that Act provides by sub-s. 1: "The powers of licensing justices under this Part of this Act may be exercised by them, in accordance with such procedure as may be prescribed by Rules made by the Secretary of State, at their general annual licensing meeting"; and by sub-s. 2 (*b*): "An order of licensing justices under this Part of this Act," that is to say, an order relating to permitted hours, "may be varied by a subsequent order." Sect. 22 provides that the Act is to be construed along with the Licensing (Consolidation) Act, 1910. We are then referred to the Licensing (Consolidation) Act, 1910, s. 10 of which provides by sub-s. 1 that: "For the purpose of granting justices' licences, the licensing justices for every licensing district shall within the first fourteen days of February in every year hold a special session (to be called the general annual licensing meeting)"; by sub-s. 2 that "the licensing justices shall hold the meeting at least twenty-one days before the general annual licensing meeting, and appoint the day, hour, and place at which the general annual licensing meeting is to be held"; by sub-s. 3 that: "The licensing justices may at any general annual licensing meeting adjourn the meeting to such day and to such place within the licensing district as they think fit for meeting the convenience of persons intending to apply for justices' licences, and a day and place for at least one such adjourned meeting shall be so appointed by the justices"; and finally, to omit a proviso which appears to me to be irrelevant, by sub-s. 4 that: "Every such adjourned meeting shall be deemed to be a continuation of the general annual licensing meeting, and shall be held within one month from the date of the original meeting; and the first adjourned meeting shall not be held on any one of the five days next after the date of the original meeting."

On what ground is it said that this adjourned meeting on March 20 was a meeting that had no jurisdiction to deal with this matter? The main ground alleged is that it was not held within one month of the date of the original meeting.

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Our attention has, however, been directed to the case of *Rex* v. *Bristol Justices* (1), where the Court—all three judges agreeing—referred to the corresponding words of the Licensing Act, 1902, s. 14 (repealed), " and every adjournment thereof shall be held within one month of the date of the general annual licensing meeting," and said that those words must mean every adjournment for new business, which could not be taken after the expiration of the month.

What was it that happened here? The meeting was originally called on February 7 last. It is common ground that it was then adjourned to March 6 last, after previous intimation by circulars to all the justices, and this proposal on behalf of this trade association came up for consideration. It could not be fully and finally dealt with on that occasion; and accordingly the licensing justices further adjourned that particular business to the meeting on March 20. It was not new business that was taken into consideration on March 20. What happened then was that the consideration which had begun on March 6 was continued and completed.

It seems to me in those circumstances that it is quite idle to contend that there was no jurisdiction in these justices to deal with the matter. They had begun the consideration of this topic on March 6. In order that they might do justice to that topic, and to all parties interested in it, they made a further adjournment, not in order that new business might be entertained, but in order that that business which was already before them might be fully and adequately considered.

In my opinion, these justices took a very proper course, and there is no ground for the contention that they either usurped jurisdiction or acted in excess of jurisdiction; and, therefore, I think that this rule ought to be discharged.

HUMPHREYS J. I am of the same opinion.

Mr. Tucker based an argument on the language of s. 10, sub-s. 4, of the Licensing (Consolidation) Act, 1910, which provides that every adjourned annual licensing meeting " shall be deemed to be a continuation of the general annual licensing meeting, and shall be held within one month from the date of the original meeting." He submitted that in this case that provision has not been complied with, because the general annual licensing meeting was held on February 7, 1936, and the justices have purported to make an order, which can only be made at such a meeting, upon March 20. If the matter were res integra, that might be a very difficult argument to answer. But for a great many years the Courts have from time to time pointed out that those words must be read with this limitation : that the general annual licensing meeting, and the statutory adjournment which must take place of that meeting, and the prohibition against continuing that meeting beyond a month have only relation to new business, and do not apply to further consideration, or consideration by the justices of matters which were properly before them at one of those first two meetings. If it be necessary at the present day to refer to any authority in support of that proposition, in my opinion the judgment of Lord Alverstone C.J. in *Rex* v. *Bristol Justices* (1), which has been referred to by my Lord, is conclusive on the matter. "The words," said Lord Alverstone, "'and every adjournment thereof shall be held within one month of the date of the general annual licensing meeting,' must mean every adjournment for new business, which therefore cannot be taken after the expiration of the month." He went on to say, speaking of course of the facts of that particular case, "The justices have, in my opinion, power to adjourn specific cases beyond the month where there is not enough time to dispose of them."

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(1) 89 L. T. 474; 67 J. P. 375.

Mr. Tucker then took the point that, if on any ground the justices can adjourn such cases as this beyond the month, *Rex* v. *Bristol Justices* (1) and other cases to which he referred show that the only ground upon which they can do so is that there is no time for the consideration of them. In my view there is nothing to be found in any case which gives support to that proposition, unless it be that the facts of the particular case are of that nature. No doubt the most general reason for adjourning consideration of cases which have to be dealt

(1) 67 J. P. 375.

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with at the general annual licensing meeting beyond the statutory month is that the justices have no time to complete the hearing of their list. But I cannot imagine a better reason for justices coming to the conclusion that it is desirable to continue the meeting by adjournment beyond the second hearing than that which the respondent justices have stated in a paragraph of their affidavit, which has already been read by my Lord, where they say that in the altered circumstances which then prevailed it was in the public interest that the appropriate means should be taken to ascertain public opinion upon the matter to enable all parties to be before them before they arrived at a final decision upon this question of the alteration—not the extension but the alteration—of permitted hours.

Mr. Tucker's third point, as I understand it, was that the justices in this case were acting beyond their jurisdiction in adjourning from March 6 to March 20, because on March 6 there was nothing before them which they could adjourn. I have difficulty in following that argument also; and I certainly do not agree with it. I think this matter also is concluded by the language of the justices' affidavit in which they state what happened. At their original meeting they came to the conclusion that there was no need, in the public interest, during this year to vary the permitted hours. They then received an application that the question be re-opened, pointing out some new facts which were unknown to them, and indeed did not exist, at the time when they had met and had come to their original decision. They state that they then had a meeting to consider that proposal in the light of the new facts which it disclosed. They say that they met and considered the desirability of re-opening the question of permitted hours. It seems to me that that was a decision by the justices to consider the matter that they are not permitted by the statute and the rules to decide on merely of their own motion. They can of their own motion say that they will not hear any body. They are entitled to say that they have come to a conclusion themselves that there is no need to re-open the case. But once they have decided to reopen the case, and to consider the question of alteration of permitted hours, then they have begun to deal with the matter and they are bound to give notices. The rule which has application to this matter is r. 4: "Where it is intended to consider any proposal to make or vary any order . . . . the clerk to the justices shall cause a notice . . . . to be published," and so forth. Therefore the justices came to the conclusion that while it was desirable in the public interest to consider the question of altering these permitted hours, they could not do that in accordance with the rules without giving every person an opportunity, by publication in the newspaper, of coming and stating his or her views upon the matter, whatever they might be. That, indeed, is provided for by r. 5: "Upon the consideration of any proposal . . . . the justices shall take such steps as seem to them fit for the purpose of ascertaining local opinion with respect to the matter in hand, and shall allow any person to address them who appears to them to be qualified to give expression to any such opinion." I think it is not without interest in this connection to observe that the rules are, no doubt intentionally, drafted in the vaguest possible manner, in order that the justices themselves should be the persons to decide what in the public interest is the best course to pursue, but should not be bound in any particular case to take a particular form of procedure. They are to consider the public interest, and in the public interest make up their minds what is the fairest way in which to have the matter raised and put before them, without adopting any other point of view. My own opinion is—and I confess I feel no doubt about it at all—that the justices, having made up their minds to reconsider this question, were fully justified in saying that in the public interest the only fair and reasonable course was to adjourn the matter. If justices are permitted, as undoubtedly they are permitted, to adjourn consideration of such a matter as the grant of a single licence beyond one month from the first day of the general annual licensing meeting, because they think it would be unfair to the parties to sit any longer on the particular day, it seems to me a fortiori that they have power to adjourn a matter of public importance like the fixing of the permitted hours beyond the statutory month in order to hear all persons who have an interest in that public question and to adjourn it in the way in which they have adjourned it in this case. I agree with my Lord that the rule ought to be discharged.

du Parcq J. I have come to the same conclusion as the other members of the Court; though not, I confess, without more difficulty than they have experienced. It would, I suppose, be too much to expect to find in the Licensing Act, 1921, a clear statement one way or other as to whether justices might or might not deal with the question of varying an order of the kind we are dealing with here at some meeting which, for one reason or another, took place more than a month after the general annual licensing meeting. It may well be that, in the light of the decision to which we have been referred as to the power of licensing justices to deal with matters after the expiration of a month in certain circumstances, it was thought unnecessary to include any express provision about it in the Act. However that may be, we have to collect the intention of Parliament from a number of sections. I am impressed by the fact that s. 12 of the Licensing Act, 1921, expressly provides, first by sub-s. 1, that the powers of justices are to be exercised in accordance with the procedure to be prescribed by rules made by the Secretary of State; and, secondly, by sub-s. 2, that orders such as the order here made on February 7, 1936, may be varied by a subsequent order. It was contemplated, therefore, that an order made at the general annual licensing meeting, as to the hours at which licensed premises must open and close, might be varied, and indeed nobody has suggested in this case that there was not power to vary this order. The rules, to which reference has been made already, require that where it is intended to consider any proposal to vary such an order, notices must be published by advertisement in the local newspapers, and, if the justices think fit, in such further manner as they may direct. I suppose that the justices might think proper to direct a notice to be given in some manner which might cause even greater delay than the insertion of advertisements in local newspapers. Taking all those matters into consideration, it seems to me that Parliament must have intended that if a decision is come to at a meeting which is a continuation of the general annual licensing meeting to consider the question of varying an order, the consideration of that question may be continued after the expiration of a month from the date of the general annual licensing meeting. Any other view might well make the power to vary such an order as this, which is expressly conferred, almost nugatory.

I have come to the conclusion that the meeting of March 6 was a continuation of the general annual licensing meeting. Mr. Tucker's argument, which I am bound to say impressed me, was that it was not really the continuation of the general annual licensing meeting—that it was not a meeting to consider anything at all. He says that what the justices did was to come together on March 6 and say that they proposed to hold a meeting after the period of one month from the date of the general annual licensing meeting had expired to consider this question, which they could not consider immediately because the necessary notices had not been given. He relies, of course, upon the words of r. 4 of the Licensing Rules, 1921. I think, however, that when one looks at the substance of the matter it is not right to say that there was nothing for the justices to consider on March 6. In one sense it is true, and indeed obvious, that they could not then consider the proposal: that is to say they could not then hear and determine the question raised by the proposal. But they could, and they did, consider the proposal in the sense, to use their own words, of considering the desirability of reopening the question of permitted hours. They considered the proposal in that sense and they came to the conclusion that it was desirable to reopen that question; and thereupon it became necessary for them to see that notice was published in the newspapers, as prescribed by the rules, and to decide whether any further notices should be given. As I have already said, it would make the provisions for varying an order made at the general annual licensing meeting almost impossible to carry out in many cases, if the justices were

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obliged to say that unless they could get everything done within the month they could not discuss the question of varying the order at all.

For these reasons, although I acknowledge the strength of Mr. Tucker's argument and find some difficulty in the words of the Act, a difficulty which, apart from the earlier decisions might have seemed insuperable, I have come to the conclusion that this rule should be discharged.

Order nisi discharged.

Solicitors: *Oswald Hanson & Smith; Wetherfield, Baines & Baines; Merrimans.*

J. R.

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July 8, 9; *July* 23, 24.

HORN *v.* MINISTER OF HEALTH.

Local Government—Compulsory Purchase Order of land—Provision of houses for the working-classes—Slum clearance—Overcrowding—Objection by owner of land—Public local inquiry—Deputation from local authority to Ministry to expedite provision of new houses under Housing Act, 1935*—Confirmation of Compulsory Purchase Order by Minister—Administrative functions of Minister—Judicial functions of Minister—Overlapping of functions—Housing Act,* 1925 (15 *Geo.* 5, *c.* 14), *Part III., s.* 64*—Housing Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 39), *Part I., s.* 1*—Housing Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 40), *Part I., s.* 1.

Under the Housing Act, 1935, s. 1, it is the duty of local authorities to cause inspections to be made to ascertain what dwelling-houses in their district are overcrowded and to make reports to the Minister of Health and proposals for the relief of such overcrowding, and under s. 1, sub-s. 2, the Minister may, after consultation with the local authority, fix dates for the performance of these duties.

A local authority in pursuance of their powers under Part III. of the Housing Act, 1925, made an Order for the compulsory purchase of certain land. The owner of the land objected to the confirmation of the Order by the Minister of Health. A public local inquiry was held by an inspector of the Ministry of Health at which it was stated that the land was required by the local authority partly for slum clearance and partly for the erection of new houses required under the Housing Act, 1935, on account of overcrowding. The local authority, before the inquiry was held, asked the Minister to receive a deputation with a view to expediting the provision of new houses under the Housing Act, 1935, and securing the payment of a subsidy as large as possible. This deputation was received at the Ministry after the public local inquiry was held, but before the confirmation by the Minister of the Compulsory Purchase Order. It was suggested by the owner of the land that representations with regard to the purchase of his land must have been made at that interview in his absence. But the representatives of the local authority and of the Minister deposed that no reference was made at that interview to the purchase of the land in question. The Minister subsequently to the interview confirmed the Compulsory Purchase Order. In proceedings to quash the Confirmation Order:—

Held, reversing the decision of Swift J., that inasmuch as the interview between the representatives of the Minister and the local authority was held for the sole purpose of carrying out the duties imposed upon the Minister and the local authority by s. 1 of the Housing Act, 1935, of consulting together for the purpose of carrying that Act into effect, and there was no evidence that the order for the compulsory purchase of the land in question was discussed at the interview, there was no such identity between the subject-matter of the deputation and the subject-matter of the Confirmation Order as to amount to an interference with the exercise by the Minister of his semi-judicial functions in confirming the Compulsory Purchase Order, and that consequently there was no ground for quashing the Compulsory Purchase Confirmation Order.

Per Slesser L.J.: Where the Minister has the right under one Act of giving advice to a local authority, and under another Act the duty of confirming Orders made by local authorities, his duty is to carry out both those powers, and they cannot be said to be contrary to one another, inasmuch as the Legislature has imposed upon him the duty of doing both.

Per Scott L.J.: Where public departments are given quasi-judicial duties to perform as well as administrative duties, the obligation to carry out their quasi-judicial duties in strict accordance with natural justice must always be considered in the light of their administrative duties.

Errington v. *Minister of Health* [1935] 1 K. B. 249 distinguished.

APPEAL from an order of Swift J. quashing an Order of the Minister of Health confirming an Order for the compulsory purchase of lands for the purposes of Part III. of the Housing Act, 1925.

On August 14, 1935, the Council of the County Borough of Sunderland in pursuance of their powers under Part III. of the Housing Act, 1925, made a Compulsory Purchase Order of certain lands specified in the Schedule thereto which included approximately 102 acres of land known as Springwell Farm in the ownership of one Allen Horn.

Notice was duly given to Mr. Horn of the making of the order, and he objected in the manner provided by the Housing Acts, 1925–1930, against the confirmation of the Order.

On December 5, 1935, a public local inquiry was held by Mr. W. J. Brown, an inspector of the Minister of Health. At that inquiry the Town Clerk said that the land was required for the pressing housing needs of the Corporation—that is to say, partly for slum clearance and rehousing, and partly for the erection of new houses which were required under the Housing Act, 1935, in order to obviate overcrowding, and which imposed upon local authorities in the country a duty to remedy overcrowding as quickly as possible. He also said that the Corporation wanted new land for the erection of 278 houses for slum clearance alone to complete the five years' programme, and in addition to that the Corporation wanted land on which to erect 7000 odd houses for overcrowding. The Corporation were proposing to use the whole of this land essentially for housing purposes, excepting a small portion of the land which was going to be used for the purposes of a public open space in continuation of what was known as the Barnes Park. The area of the land to be used in that way would be about fifteen acres.

The Borough Surveyor, in giving evidence, said the ultimate area for housing was approximately 76 acres, which would allow the Corporation to build 915 houses, of which 278 would be wanted for slum clearance; leaving 637 houses as a portion of the Corporation's contribution towards the prevention of overcrowding.

On November 19, 1935, the Minister of Health issued a circular, No. 1507, to local authorities fixing the following dates for carrying out duties imposed by the Housing Act, 1935: (I.) for completing an inspection of the working-class houses in the district of the local authority to ascertain the overcrowded houses—April 1, 1936; (2.) for preparing and submitting to the Minister a report on the inspection showing the result of the inspection and the number of new houses required in order to abate overcrowding in the district—June 1, 1936; (3.) for preparing and submitting to the Minister proposals for the provision of new houses required for this purpose—August 1, 1936.

Mr. Horn in his affidavit said that on December 6, 1935, the day following the local inquiry, the Town Clerk sent out a notice for a meeting of the Council on December 11, 1935, to pass resolutions with respect to a report of the Health Committee in which the Committee referred to Circular 1507 of the Minister of Health requesting compliance by the Council with the time-table fixed by him under the Housing Act, 1935, including " (i.) for completing an inspection of the working-class houses in the district of the local authority to ascertain the overcrowded houses.—1st April, 1936; (ii.) for preparing and submitting to the Minister a report on the inspection, shewing the result of the inspection and the number of new houses required in order to abate overcrowding in the district—1st June, 1936; and (iii.) for preparing and submitting to the Minister proposals for the provision of the new houses required for this purpose—1st August, 1936"; and recommended (*a*) that their action in appointing a deputation comprising the Mayor, the Chairman of the Committee, and the appropriate officers to wait upon the Minister of Health with a view to expediting the provision of new houses under the Housing Act, 1935, be confirmed; (*b*) that the land known as Springwell Farm, comprising approximately 103 acres, an Order for the compulsory purchase of which was approved by the Council on August 14 last, be allocated for the purpose of rehousing under the Act. Mr. Horn alleged that the minutes of the meeting of the Council on December 11, 1936, showed that the Council adopted the report. He also referred to the issue of the Sunderland Echo of December 20, 1935, which contained the following report:—

" In regard to housing it was reported that a deputation from Sunderland Corporation had interviewed the Ministry of Health in order to start building houses at once to combat overcrowding, instead of waiting until the middle of next year before the plans, as a result of a survey now being made in the town, can be submitted to the Ministry.

"Agreeing that it was obvious that a large number of houses would be required to meet the overcrowding problem, the Ministry gave permission for the Corporation to proceed with the building of houses at once and the Borough Engineer was instructed to prepare a lay-out."

Mr. Horn also referred to the agenda of the Council dated January 10, 1936, for a meeting to take place on January 15 which contained the following: "Report of the Health Committee. That the Borough Engineer be instructed to prepare and submit plans for the construction of 800 houses at Springwell Farm under the terms of and for the purposes of the Housing Act, 1935."

On January 11, 1936, the Minister of Health confirmed the Compulsory Purchase Order in question.

Para. 9 of Mr. Horn's affidavit was as follows: "It would therefore appear that between the date of the local inquiry (December 5, 1935) and the confirmation of the Order (January 11, 1936) a deputation from the Sunderland Corporation visited the Minister of Health and discussed with him, or his officials, matters relevant to and touching upon the subject-matter of the inquiry and questions relevant to the confirmation of the Compulsory Purchase Order in question. I was not present nor was I given any opportunity of being present when the deputation discussed these matters with the Minister and/or his officials. I submit to this honourable Court that in receiving such deputation and discussing matters touching upon the subject-matter of the inquiry and relevant to the confirmation of the Order in my absence, the Minister acted contrary to law, and that the said Compulsory Purchase Order should be quashed on the same ground as the Order in *Errington's* case (1) was quashed, namely, that the Minister in confirming the said Compulsory Purchase Order failed to act judicially after the notice of objection had been given. . . . ."

On November 30, 1935, the Town Clerk wrote to the

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(1) [1935] 1 K. B. 249.

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Secretary, Ministry of Health, saying: "I am directed by the Health Committee for this Borough to inform the Minister of Health that they have appointed a deputation comprising the Mayor, the Chairman of the Committee, the Town Clerk, the Borough Engineer, the Medical Officer of Health and the Borough Treasurer to wait upon the Minister with respect to the following matters:—

1. Expedition of the provision of new houses under the Housing Act, 1935.

2. The proposed Nurses' Hostel at the Municipal Hospital.

3. The question raised by the Minister regarding the proposed colony of houses for tuberculous families. . . . ."

The Town Clerk made an affidavit in which he said: On Thursday, December 12, 1935, in company with the Chairman of the Health Committee, the Medical Officer of Health, the Borough Engineer, and the Borough Treasurer, I visited the Ministry of Health and had an interview with Mr. W. H. Howes of the Ministry, and a discussion took place with regard to the action proposed to be taken by my Council in order to carry out their obligations under the Housing Act, 1935. On December 14, 1935, I made a written note of what happened at the interview with Mr. Howes. It will be observed that in the note no reference is made to the Sunderland (Durham Road) Housing Order, 1935, and I definitely say that the question of that Order was not considered at the interview.

Mr. J. G. Wrigley, the Director of Housing, Slum Clearance and Town Planning in the Department of Health, made an affidavit in which he deposed that before a decision was arrived at to confirm the Order, the subject-matter of this appeal, the report of Mr. W. J. Brown as to the evidence given at the inquiry and as to his personal inspection of the properties included in the Order, together with the representations made by the applicant, Mr. Horn, were duly considered; and that as a result of such consideration it was decided to confirm the Order.

Mr. W. H. Howes, a Principal in the Department of the Ministry of Health, made an affidavit in which he deposed

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that he had read Mr. Allen Horn's affidavit and that with regard to para. 9 of that affidavit: " I received a deputation from the Sunderland Corporation on December 12, 1935. To the best of my recollection and belief no reference was made to the Order, the subject of this appeal, and the deputation were not concerned with the Order in question. What took place was as follows: The Clerk to the Corporation said that the Medical Officer of Health estimated it would be necessary to rehouse over 7000 families under the Housing Act, 1935, and that the Council intended to ask the Minister to consent to the erection of 800 houses on a site belonging to them at Hylton Lane, but that this was largely dependent on the payment of a subsidy under s. 32 of the Housing Act, 1935, in order to enable the houses to be let at sufficiently low rents. I said that the Minister would offer no objection and that the application for a subsidy would not be prejudiced by reason of the fact that the building of the houses might be commenced before a decision on the application had been given, and arrangements were made that the Clerk should submit a formal application for subsidy when forwarding details of the scheme to the Minister for his consideration. The Clerk finally mentioned that it was probable that the Council would make arrangements with the North-Eastern Housing Association for the erection of a certain number of houses on the Council's behalf. Except as herein set out no matters were so far as I remember discussed at the interview."

The applicant, Mr. Horn, applied to Swift J. to quash the Sunderland (Durham Road) Housing Confirmation Order, 1935.

Swift J. on July 9, 1936, quashed the Order. In the course of his judgment he said: The complaint which is made here is that after the public inquiry had ended, and whilst the Minister was still acting as the judicial person who had to decide between these two parties what should be done in this matter, he received through one of his agents a deputation from the Corporation which came for the express purpose of discussing with him housing in Sunderland. It is said that, in fact, this particular piece of land was not discussed at all. On the other hand it is said: " Well we cannot say that it was discussed because we were not there; that is our complaint, but there was some discussion about housing. What the discussion about housing was we do not know, because we were not there to take part in it. We do know now that there was a discussion about the provision of 800 houses, and this piece of land of ours was the only land the Corporation had got upon which they could put 800 houses, and directly after they had got the powers they passed a resolution to put 800 houses on to this piece of land. Therefore," says the applicant, " although I cannot say what really did happen before the Minister because I was not there, I have a very shrewd suspicion that there was a talk about houses which it was intended that the Corporation should erect upon my land, even if it was not brought directly to the attention of the Minister." Now it is said on behalf of the applicant that it was wrong for the Minister to receive a deputation from the Corporation in the circumstances then existing, that the public inquiry had just been concluded, and that until the Order was confirmed he was acting in a quasi-judicial position; he had to discharge his functions judicially. It has been laid down in all the cases dealing with these matters that in exercising that judicial function he must not hear one party behind the back of another. Nothing is to be said to the person who has to decide a matter between the parties by one of them which the other party has not full opportunity of hearing and answering. It is said here by Mr. Horn: " After the public inquiry and before the Minister confirmed this Order he received a deputation from the Corporation which discussed with him the question of housing in Sunderland, and that is enough to make this confirmation of the Order invalid, although I cannot prove that they actually spoke about this particular piece of land which was being bought from me." I have to decide whether that contention is well founded or not, and, in my view, it is. Whatever may be the inconvenience of it, and whatever may be the desirability of some other system, it seems to me that since

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the decision in *Errington's* case (1) there is no getting away from the fact that the Minister is a quasi-judicial authority, and that he must act in a judicial manner, and he must not receive, however inconvenient it may be that he should not, people from one side without hearing the other side, and giving an opportunity to the other side to say what they want to about the allegations that are made. . . . . I think this case is covered by *Errington's* case. (1) I cannot distinguish between the Minister going by his agents to the town, as was done in *Errington's* case (1) in the case of Jarrow, or the town by its agents going to the Minister, as was done in the present case when Sunderland went by a deputation to see the Minister over this matter. I cannot distinguish between the two, and *Errington's* case (1) seems to me to govern this one. But if anything more were required I should say that certainly in this case justice would not seem to be done. Having participated in the local inquiry which had been held on December 5, 1935, to determine whether or not the Corporation should acquire 102 acres of his land, any reasonable man might, I think, properly come to the conclusion, when he heard a day or two afterwards or a week afterwards, that a deputation from the Corporation had been up to London to see the Minister of Health, who had to decide the matter, that they had gone to see him about these matters, as indeed it is clear on the statement now before me they did, in the sense that they went there for the purpose of generally discussing housing in the district of which this was a small portion, and I think probably discussing this amongst other things, but at any rate discussing the 800 houses which it was proposed should be put upon this land. I think, therefore, that in arriving at a decision to confirm this Order the Minister received evidence and statements which he should not have done, in the sense that they were not communicated to the other side, and the other side had no opportunity of answering them, and therefore I think the confirmation is bad. In saying that I must not for one moment be thought to be saying that I think Mr. Howes acted in any way in bad faith. I do not think he did, and I do not think the Corporation acted in bad faith, any more than I think Mr. Horn, when he wrote to the Minister, acted in bad faith. It is one of the difficulties caused by this system of administration under these Acts, where a Minister is partly administrator and partly judge, that people do not quite know what he is. He varies from time to time, and people go to him when they should not, and he hears them when he should not. I do not think that either the Corporation of Sunderland or Mr. Howes or Mr. Horn acted in bad faith in this matter, but I think it was an irregularity of which Mr. Horn is entitled to complain, and it is an irregularity going so much to the root of the matter that, in my view, it makes the confirmation bad, and I therefore direct that this Order be quashed.

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(1) [1935] 1 K. B. 249.

The Minister of Health appealed. The appeal was heard on July 23 and 24.

Sir Terence O'Connor S.-G. and *Valentine Holmes* for the Minister of Health. The decision of Swift J. quashing the Confirmation Order of the Minister was wrong. The Minister of Health has been invested by Parliament under the provisions of the Housing Acts, 1925, 1930 and 1935, with administrative functions and also with judicial functions, and those functions in some cases overlap. The mere fact that those two sets of functions overlap will not, however, make the exercise by the Minister of his judicial functions invalid, and the Courts have no right to interfere and quash an Order made by him in his judicial capacity. Under s. 1 of the Housing Act, 1935, a duty is imposed upon local authorities to cause inspections of their district to be made and to make reports to the Minister and proposals as to overcrowding. Sub-s. 2 of s. 1 provides for consultations between the Minister and a local authority. Every consultation between the Minister and a local authority with regard to housing in a particular area must affect the mind of the Minister with regard to a confirmation by him of any Compulsory Purchase Order of land which was then in contemplation. A consideration of the housing in the

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neighbourhood is necessary before the Minister can make a Compulsory Purchase Order; there must therefore be an overlapping between the administrative and judicial functions of the Minister. It was held in *Errington* v. *Minister of Health* (1) that a local authority must not meet the Minister with reference to the particular matter upon which he has to exercise his judicial functions in order to deflect his judgment with regard to that matter. It is clear, however, from the observations of Greer L.J. in that case (2) that he considered that an approach might in some cases be properly made to the Minister with regard to the subject-matter of the inquiry. Greer L.J. also pointed out in *Offer* v. *Ministry of Health* (3) that the Minister might under the Act of 1925 call upon the local authority for a report and might make an investigation after the report was made, so that he would have some knowledge with regard to the matter before he began his semi-judicial inquiry. The visit of the deputation from the Sunderland Corporation to the Ministry was made in order to assist in carrying out the Act of 1935, and was arranged before the holding of the public local inquiry, and it was quite fortuitous that an inquiry was going to be held with reference to a small portion of the area in question. The facts of the present case are quite different from those in *Errington's* case (1), and no injustice has been done. This is a case in which the Minister has administrative duties to perform, and the Act of 1935 requires him to hold consultation with the local authority notwithstanding that he has also semi-judicial functions to perform. If it were to be held that there could be no approach to the Minister by a local authority with reference to administrative matters because the Minister had a semi-judicial function to perform with regard to some part of those matters, a position of intolerable difficulty would be created.

[*In re Manchester* (*Ringway Airport*) *Compulsory Purchase Order* (4) was also referred to.]

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(1) [1935] 1 K. B. 249.

(2) Ibid. 261.

(3) [1936] 1 K. B. 40, 47.

(4) (1935) 153 L. T. 219.

R. M. Montgomery K.C. and *H. A. Hill* for Mr. Horn. This case ought to be decided upon its own particular facts. The local authority took up the position at the inquiry that this land was wanted partly for slum clearance and partly for building houses under the 1935 Act, whereas according to Mr. Howes' affidavit the deputation discussed with the Ministry the erection of 800 houses on land at Hylton Lane, not for slum clearance, but under the Act of 1935 in order to overcome overcrowding. There was a proposal to erect 800 houses at Springwell Farm for the purposes of the Housing Act, 1935, and further not more than 500 houses could be erected upon the land at Hylton Lane, and therefore the only inference possible is that the erection of 800 houses at Springwell Farm for the purposes of the 1935 Act was discussed at the interview of the deputation with the Ministry. An important consideration was therefore put before the Minister in the absence of the other party and the case comes within the authority of *Errington's* case (1), and the decision of the Minister cannot stand. The duty of the Minister to obtain a report from the local authority under s. 1, sub-s. 1, of the Housing Act, 1935, does not conflict with his duty not to hear one side in the absence of the other side, because the Minister could easily send the report to the other side.

Valentine Holmes replied.

GREER L.J. This is an appeal from the order of Swift J. quashing an order for compulsory purchase which was made by the Minister of Health under the provisions of certain statutes, beginning with 1925 and concluding with 1930 and 1935. The Order which was made by the local Council, and which is the beginning of the matter which has to be discussed, was made under the Housing Acts, 1925 to 1935, and the Council passed this resolution: "Subject to the provisions of this Order, the Council of the County Borough of Sunderland are hereby authorised to purchase compulsorily for the purposes of Part III. of the Housing Act, 1925, the lands described in the Schedule hereto which lands are shown

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(1) [1935] 1 K. B. 249.

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coloured pink on a map marked ' Sunderland (Durham Road) Housing Order, 1935 ' and sealed with the common seal of the Council.'' Therefore it is apparent from that Order, which is made in the first instance by the Council subject to confirmation, that they were desirous of being authorized to purchase compulsorily for the purpose of Part III. of the Housing Act, 1925, the land known as Springwell Farm, the boundaries of which are particularly described in the Schedule to the Order. That Order, like other Orders of that kind, does not operate until it has been confirmed by the Minister. It has to be published, and if the owner, whose land it is proposed to take compulsorily, objects to having his land taken compulsorily, he is entitled to go before an inspector appointed by the Ministry for the purpose of holding a local inquiry, and to urge his objections. In the present case the owner of the land proposed to be taken compulsorily, Mr. Horn, did urge his objections, the main objection being that the Council had plenty of land of their own, and did not require to take his farm for the purpose of carrying out the Order which they had made. That matter was considered by the inspector, and he made a report to the Ministry of Health, the contents of which we do not know and have no opportunity of ascertaining. The Council, before the holding of the inquiry, asked for an appointment before the Minister in order that the Minister, in his administrative capacity, might deal with their general requirements; but they were unable to get an appointment until after the hearing of the public local inquiry. They got an appointment at a later date after the inquiry, and they thereupon sent their Town Clerk and other representatives to interview the Minister. I have no doubt whatever that if at that meeting representations had been made to the Minister of Health behind the back of the objector in order to persuade the Minister to confirm the Order made by the Council, then there would have been ample jurisdiction in the Court to say that such action was not only contrary to natural justice, but also contrary to that which is implied in the powers given to the Minister under the statutes. But nothing of the kind happened, as I understand the evidence which was before the learned judge. Mr. McIntire, the Town Clerk, made an affidavit, in which he says: "I visited the Ministry of Health and had an interview with Mr. W. H. Howes of the Ministry and a discussion took place with regard to the action proposed to be taken by my Council in order to carry out their obligations under the Housing Act, 1935." In order to carry out those obligations the Council had to take certain steps by certain dates which are provided for in the statute. Then he goes on to say: "On the 14th day of December, 1935, I made a written note of what happened at the interview with Mr. Howes, and a copy of that note is now shewn to me and marked 'G. S. M.' It will be observed that in the note no reference is made to the Sunderland (Durham Road) Housing Order, 1935, and I definitely say that the Sunderland (Durham Road) Housing Order, 1935, was not considered at the interview." I need not read the note, because it absolutely confirms the statement contained in the affidavit. There were two other affidavits which must also be considered. Mr. Howes of the Ministry of Health made an affidavit to this effect, referring to the affidavit of Mr. Horn in para. 9: "I received a deputation from the Sunderland Corporation on the 12th December, 1935. To the best of my recollection and belief no reference was made to the Order, the subject of this appeal, and the deputation were not concerned with the Order in question. What took place was as follows. The Clerk to the Corporation said that the Medical Officer of Health estimated it would be necessary to rehouse over 7000 families under the Housing Act, 1935, and that the Council intended to ask the Minister to consent to the erection of 800 houses on a site belonging to them at Hylton Lane, but that this was largely dependent on the payment of a subsidy under s. 32 of the Housing Act, 1935, in order to enable the houses to be let at sufficiently low rents. I said that the Minister would offer no objection and that the application for a subsidy would not be prejudiced by reason of the fact that the building of the houses might be commenced before a decision on the application had been given." Now two things are apparent from those affidavits:

Firstly, that the interview was not concerned with the provision of houses under the 1930 Act at all, but was only concerned with the provision of houses under the 1935 Act, and it was part of the duty of the Minister and of the Council to consult together in order to see what ought to be done in relation to the Act of 1935, and it was obviously to the interest of the Council to urge upon the Ministry that they should be allowed the largest sum that it was competent for the Ministry of Health to allow them in respect of the houses that they had to build under the statute of 1935. Under those circumstances, I cannot for myself see that there was anything wrong done, either by the Council or by the Minister, in considering the questions which were put before him at the interview which took place after the public inquiry had been held but before the publication of the Minister's decision in relation to the objections which had been put forward at the public inquiry.

Dealing with the cases which have been cited, it seems to me that neither of the two cases referred to have any relation to the facts of the present case. In *Errington* v. *Minister of Health* (1) it is quite clear that what took place after the inquiry had been held but before the Confirmation Order was made was that arguments and facts were put before the Minister by the Council in order to persuade him to make the Order which was the subject-matter of the local inquiry. In those circumstances, it was clear that the provisions of natural justice that both sides should be heard, which applies to all questions where the Minister is exercising his quasi-judicial functions, had not been complied with, and therefore the Order was rightly ordered to be quashed. In the other case, *Offer* v. *Minister of Health* (2), the interviews all took place before the public inquiry had been held and before any objections had been lodged and, of course, it could not properly be urged against the Minister with any chance of success that he was, at the time of the interviews, engaged in a quasi-judicial function.

Mr. Montgomery referred to the decision of Branson J.

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(1) [1935] 1 K. B. 249.

(2) [1936] 1 K. B. 40.

in the case of *In re Manchester* (*Ringway Airport*) *Compulsory Purchase Order*. (1) All I desire to say about that case is this, that it does not raise the same question as is raised in the present case, and I reserve my right to say, if the question should directly arise, whether I agree or disagree with his decision. It must not be supposed that anything we say in this case amounts to an expression of approval or disapproval with the decision of Branson J. in that case.

I think the appeal must be allowed, with the usual consequences.

SLESSER L.J. I am of the same opinion. In this case it appears when the evidence is considered that the difficulty has arisen by reason of the fact that the Minister performed different functions under two different Acts of Parliament—namely, those of 1925 and 1935. Under the 1925 Act it was his duty to consider and confirm, with or without modification if he thought fit so to do, the Order which the local authority proposed to make for the purchase of the land of Mr. Horn compulsorily under s. 64 of the Housing Act, 1925. I agree entirely with what my Lord has said, and with what I think indeed has been already decided in this Court in the case of *Errington* v. *Minister of Health* (2), that if, in deciding whether or not he should confirm that clearance Order, the Minister were to hold any kind of private inquiry to which one of the parties was not invited, or to take into consideration ex parte statements which the owners of the land proposed to be acquired compulsorily had no opportunity of dealing with, he would not have been acting in accordance with the correct principles of justice. But when the facts of this case are considered and the acts of the Minister are taken into consideration, I think it is impossible to bring this case within the principle or the facts considered in *Errington's* case. (2)

First of all, we must have regard to the affidavits to which my Lord has made reference, which seem to me (and they are indeed the only evidence on which we have to rely) to show quite clearly that on the only occasion when the owner says that the mind of the Minister might have been influenced the matters which were discussed by the Minister through his representative and the local authority were matters quite other than the compulsory purchase of this land. As my Lord has pointed out, Mr. McIntire, the Town Clerk, says that at this interview no reference was made to the Sunderland (Durham Road) Housing Order. He deposes: "I definitely say that the question of the Sunderland (Durham Road) Housing Order, 1935, was not considered at the interview." He calls attention to the fact that in the note which he made of what happened there is no such reference, and Mr. Howes of the Ministry of Health, as I read his affidavit, speaks to the same effect. He says: "To the best of my recollection and belief no reference was made to the Order, the subject of this appeal, and the deputation were not concerned with the Order in question." True it is that he goes on to give an account on which Mr. Montgomery founds his argument. He says: "What took place was as follows. The Clerk to the Corporation said that the Medical Officer of Health estimated it would be necessary to rehouse over 7000 families under the Housing Act, 1935, and that the Council intended to ask the Minister to consent to the erection of 800 houses on a site belonging to them at Hylton Lane." Mr. Montgomery argues that that reference to Hylton Lane should be taken to be a reference to the respondent's land; I see no reason for making that assumption. This gentleman states that no reference was made to the Order, and he is speaking specifically of the erection of houses on a site belonging to them, meaning the Council. The Council did not own the farm, but Mr. Horn owned the farm, the subject-matter of this present appeal. There may or may not have been some mis-recollection, but there is no possible evidence at all to the effect that this Order of the Council was ever discussed—there is much evidence to the contrary. I am unable, no evidence having been called at the trial, to draw any conclusions other than those of the facts which are stated in these affidavits. With regard to the second duty,

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(1) 153 L. T. 219.

(2) [1935] 1 K. B. 249.

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in connection with which the Council did go to see the Ministry, I think it is clear what happened. The Act of 1935 by s. 1 puts upon the Council a duty to inspect and make reports to the Minister of Health and proposals as to overcrowding. Those duties had to be performed at certain specified dates, and by a circular of November 19, 1935, the Minister states that he had decided to fix for the completion of inspection, the 1st of April, 1936, for the submission of the report, the 1st June, 1936, and for the submission of proposals, the 1st August, 1936. Now all that was done, in my opinion, with regard to this interview which is complained of here, was done in relation to that circular, and to the duties of the local authority under the Act of 1935. On November 30, 1935, with commendable speed after receiving the circular, the Town Clerk writes to the Ministry saying: "I am directed by the Health Committee for this Borough to inform the Minister that they have appointed a deputation . . . . with respect to the following matters." There are three matters, but only one has relation to anything we have here to consider, and that is "(1.) Expedition of the provision of new houses under the Housing Act, 1935." It is clear, therefore, that they sought an interview with the Minister for the purpose of dealing with the inspections and the reports and the other duties which were placed upon them for the first time under the Act of 1935. When the subsequent proceedings are considered that becomes quite clear. On December 6, 1935, the Town Clerk gave notice that a meeting of the Council would be held to pass resolutions regarding the report of the Health Committee, of which again I think only one matter has reference to the interview with the Minister, and that is: "For completing an inspection of the working-class houses in the district of the local authority to ascertain the overcrowded houses," and then follows a reference to April 1, 1936, which was the date which the Minister had fixed for the completion of the inspection. Then it goes on: "For preparing and submitting to the Minister proposals for the provision of the new houses required for this purpose, 1st August, 1936, and they recommend that their action in appointing a deputation comprising the Mayor, the Chairman of the Committee and the appropriate officers to wait upon the Minister of Health with a view to expediting the provision of new houses under the Act be confirmed." That is ample corroboration, I think, of the fact that their sole purpose in going to the Ministry was to carry out their powers and duties under the Act of 1935, s. 1. True it is that there also appears in that notice of the meeting of the Council a recommendation that the land known as Springwell Farm, that is, the respondent's land, "an Order for the compulsory acquisition of which for the housing purposes was approved by the Council on the 14th August last, be allocated for the purpose of rehousing under the Act." In strictness, of course, they could not allocate it until they had received the confirmation of the Minister, which was not then forthcoming; but I do not read that recommendation, which is followed by another recommendation dealing with an entirely different matter, as having anything to do with the purpose of their interview with the Minister.

In these circumstances the case seems to me to resolve itself into this, that short of some discussion or reference before the Minister to the matter with which he was concerned under the Act of 1925 in which he was confirming a Compulsory Purchase Order, a general discussion in relation to the matters raised under the overcrowding sections of the Act of 1935 had nothing whatever to do with the taking of the respondent's land. Although, as my Lord has said, the case of *Offer* v. *Minister of Health* (1) is strictly distinguishable from this case by reason of the fact that there the inquiry was made before there was any issue or lis between the parties at all, yet in the course of that case I, at any rate, expressed the view that whether or not the inquiry there had taken place before the issue was joined between the parties, unless the case fell within the ambit of *Errington's* case (2), and unless what was done at the inquiry was for quite a different purpose, or fell under a different power, the Minister had the right to do it. In that case I pointed out that under the Housing Act of 1935,

(1) [1936] 1 K. B. 40.

(2) [1935] 1 K. B. 249.

s. 117, the Minister had specific powers, and I said (2): "If the Minister has that right to give that advice, and also has the duty imposed upon him under s. 2 of the Housing Act of 1930 of confirming Orders, it follows that he must or may carry out both these powers, and they cannot be said to be contrary to one another when the Legislature has in tact given him the authority both to do the one and to do the other—namely, first, give the advice, and secondly, consider quasi-judicially the confirmation of the Order." Roche L.J. in giving judgment says that he agrees that the appeal should be dismissed, "for the reasons given by the Lords Justices who have given judgment," that is to say, he agrees not only with what my Lord had said with regard to the inquiry not affecting the adjudication because it had occurred before the adjudication, but I myself take it that he is also agreeing with the reasons which I had stated, since he says that he agrees with both of us. Therefore, once it is shown that this is a case where it cannot be certain that there is any direct influence or interference with the quasi-judicial powers of the Minister in considering the Order, then it seems to me that the case does not fall directly within *Errington's* case (1), but within the observations which I made in *Offer's* case (2), observations which I understand Roche L.J. to agree with.

That being so, I think the Minister here was fully entitled, indeed, if I may say so, it was his duty under the 1935 Act by discussion and consultation to consider with the local authority the overcrowding of their district, and the mere fact that in the area which he had to consider in relation to overcrowding there happened to be, among other lands, the land of this respondent, does not justify him in saying that because the consideration of overcrowding in Sunderland generally may or may not have had some reaction on his rights as owner of a particular piece of land, that therefore the Minister and the local authority in carrying out their duties were doing anything which might influence the Minister so that it could be said he was not acting judicially in dealing with the subject-matter of the confirmation.

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(1) [1935] 1 K. B. 249. (2) [1936] 1 K. B. 40, 51.

I would only add this finally, that it is material to observe that Mr. Wrigley, who swears an affidavit on behalf of the Ministry of Health, dealing with the subject, not of the inquiry under the Act of 1935, but dealing with the confirmation, says: "Before a decision was arrived at to confirm the Order, the subject-matter of this appeal, the report of Mr. W. J. Brown as to the evidence given at the inquiry and as to his personal inspection of the properties included in the Order, together with the representations made by the applicant were duly considered. As a result of such consideration it was decided to confirm the Order." Mr. Wrigley is the Director of Housing, Slum Clearance and Town Planning in the Department of the Ministry of Health, and I read that affidavit as meaning that when a decision was made about confirmation no matters were considered other than those which are stated in his affidavit—namely, the report of the gentleman who held the inquiry and the representations made by the applicant. That affidavit is also strong reason for coming to the conclusion that *Errington's* case (1) and the principles there laid down have no application to the present case.

I agree that this appeal succeeds.

Scott L.J. I agree with my two brethren that this appeal should be allowed, and I agree with the reasons upon which they have based their judgments. Swift J., as it seems to me, misapplied the decision in *Errington's* case (1), because he thought that the Minister here in effect heard one side in the absence of the other side on the subject-matter of the inquiry, which was still sub judice. The learned judge in his judgment quotes the principle that you shall not hear one party behind the back of the other, and then he goes on: "It is said here by Mr. Horn: 'after the public inquiry and before the Minister confirmed this Order he received a deputation from the Corporation which discussed with him the question of housing in Sunderland, and that is enough to make this confirmation of the Order invalid, although I cannot prove that they actually spoke about this particular piece of land

(1) [1935] 1 K. B. 249.

which was being bought from me.' " Then the learned judge goes on: "I have to decide whether that contention is well founded or not, and, in my opinion, it is. Whatever may be the inconvenience of it, and whatever may be the desirability of some other system, it seems to me that since the decision in *Errington's* case (1) there is no getting away from the fact that the Minister is a quasi-judicial authority, and that he must act in a judicial manner, and he must not receive, however inconvenient it may be that he should not, people from one side without hearing the other side, and giving an opportunity to the other side to say what they want to about the allegations that are made." It is impossible, as it seems to me, to read that passage without concluding that the learned judge was acting upon the assumption that the subject-matter of the deputation was necessarily identical with the subject-matter of the inquiry and, therefore, of the dispute between Mr. Horn and the Corporation, upon which the Minister had to adjudicate in his judicial function. It was for that reason that the learned judge felt bound by the decision in *Errington's* case. (1) But I think that he was taking an erroneous view of the facts of this case. In my opinion there was no such identity as he assumed. It is common ground between the parties in this Court, and I think it was really common ground in the Court below, that nothing whatever was said at the deputation which involved any consideration at all of the particular subject-matter of the inquiry which had taken place and upon which the Minister's Order of confirmation of purchase depended. There could be no objection to the Minister carrying out his administrative duty of consulting with the Corporation in regard to matters in relation to overcrowding under the Act of 1935, unless the subject-matter of the deputation had an inevitable relevance to the subject-matter of the purchase Order and the inquiry. On consideration here I have come to the conclusion that there was no such relevance. The subject-matter of the deputation was the general question of what financial assistance they could obtain from the Minister under s. 32 of the Act

(1) [1935] 1 K. B. 249.

of 1935, and whether they could proceed with their work without waiting for the further steps being taken upon which such financial assistance depended. In my view, those facts do not constitute any identity of subject-matter between the two competing subjects of discussion. The Minister was under a statutory duty to carry out his functions under s. 1 of the Act of 1935, which was elaborated by him in his circular of November 19, 1935, and that was a duty which rested on him, as well as on the local authorities, to get the new programme of relief of overcrowding through rapidly. To have postponed any action that was necessary for the purpose of the overcrowding programme would have been contrary to his administrative duty, unless there was some ground which compelled him so to postpone it.

I am in agreement with the argument of the learned Solicitor-General and Mr. Valentine Holmes, that where public departments are given under this type of Act quasi-judicial duties as well as administrative duties, the need of their carrying out their quasi-judicial duties in strict accordance with natural justice must always be considered in the light of their administrative duties also. The administrative duties have to be carried out as part of the policy of Parliament imposed upon the Minister by the statute which he is administering, and Parliament must be taken quite deliberately to have decided that the performance of his administrative duties under the Act is compatible with the exercise of his quasi-judicial functions. In my view, this particular case illustrates very clearly how the two types of duties can go together and be compatible one with the other. Ex hypothesi the Minister had the administrative duty of seeing the deputation to discuss the general position under the Act of 1935. To have postponed the consultation would have been contrary to the policy of Parliament expressed in that Act. Unless, therefore, it was a case of the mere discussion of the question, upon which that consultation was to be held prejudicing the fairness of his decision under the quasi-judicial duty which he was also in course of performing, I am clearly of opinion that he was free to carry out his administrative duty, and see the deputation. That really is the whole question in this case, and I agree with what my learned brethren have said as to the facts, and I do not want to add anything to what they have said upon them.

I agree that this appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *The Solicitor, Ministry of Health.*

Solicitors for respondent: *Maples, Teesdale & Co., for Steel, Maitland & Byers, Sunderland.*

R. F. S.

KEARNS *v.* GEE, WALKER & SLATER, LIMITED.

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1936
Oct. 15.

Negligence—Accident to workman—Bricklayer injured by falling brick—Breach of statutory regulation—" Steam, water or other mechanical power "—Electrical crane—" Habitually employed "—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 79*—Building Regulations*, 1926, *para.* 31.

By para. 31 of the Building Regulations, 1926, made under the Factory and Workshop Act, 1901, which apply to all premises on which machinery worked by steam, water or other mechanical power is temporarily used for the purpose of the construction of a building: " Any part of the premises in which any person is habitually employed shall be covered in such a manner as to protect any person who is working in that part from being struck by any falling material or article."

The plaintiff, a bricklayer, having been struck while at work on a building under reconstruction by bricks falling from a higher floor and thereby injured, claimed damages for negligence, as having been due to the breach of a statutory regulation—namely, para. 31 set out above. The county court judge dismissed the action on the ground that the scaffolding where the accident happened having only been in position for a day and a half, neither the plaintiff nor any other person was habitually employed there. On appeal:—

Held, (1.) that " mechanical power " includes an electric crane; (2.) that the regulation assumed that workmen would have to move about from one part of the premises to another and imposed a duty upon the employers to afford protective cover against falling material in all parts of the building where it might be required, for the benefit of any person who might be working there. The plaintiff was therefore entitled to recover damages for his injury.

Appeal from Westminster County Court.

The plaintiff was a bricklayer employed by the defendants, building contractors, on the construction of a building in Finchley Road. He claimed damages for injury caused by negligence, having been struck, while working on scaffolding, by bricks falling from a higher floor. The defendants pleaded that the accident was due to the negligence of another workman in common employment. The plaintiff replied that the accident was due to breach of a statutory regulation—namely, para. 31 of the Building Regulations, 1926, made under the Factory and Workshop Act, 1901, which is as follows: "Any part of the premises in which any person is habitually employed shall be covered in such a manner as to protect any person who is working in that part from being struck by any falling material or article."

The county court judge in the course of his judgment said there was a staging erected over the face of the particular part of the building above where the plaintiff was working, extending about 10 or 12 feet, and on that were deposited boxes of bricks. These were loaded into a barrow. According to the evidence the barrow was not out on the platform. A witness, Lloyd, propelled the barrow along the floor, and one of his legs caught in a ledge and he fell, and some bricks fell out and hit the plaintiff. That was due to the negligence of the way in which the barrow was being moved. Lloyd was in common employment with the plaintiff, and the plaintiff could not, therefore, at common law, recover from the defendants. He said, however, that the defendants were guilty of a breach of statutory regulations. His Honour read Regulations, paras. 30 and 31, and said that the evidence supplied no material on which he could see a breach of the Regulations. If the word "habitually" was taken out of the paragraph all difficulty disappeared. The plaintiffs' counsel contended that "habitually" could mean very little, But it must mean something which was going to be there for such a time that a person could be said to be in that spot. Could he find that because the plaintiff was employed for a day or a day and a half there that he was habitually employed there? If the employers were prosecuted for a breach, it would be argued that he was not habitually employed there. He was bound to consider the case in that way. The plaintiff ought not to succeed, and he gave judgment for the defendants; but the matter was an important one, and should go further.

The plaintiff appealed. The appeal was heard on October 15, 1936.

J. Alun Pugh for the appellant. The learned judge misdirected himself on the construction of para. 31 of the Regulations. He held that the regulation did not apply to the appellant, because he had only been employed on that part of the premises for one day before the accident happened. So read, the regulation would be completely ineffectual. The Regulations contemplate that the workmen will be moving about at their work, one succeeding another, and any one working at a place requiring protection from falling material comes within the regulation, and is entitled to protection.

F. W. Beney for the respondents. I submit that the case does not come within the Regulations at all. The words in the preamble refer to buildings where machinery is used worked by steam, water or other mechanical power, and the expression "other mechanical power" must be construed ejusdem generis with the previous words. The only machine worked on this building was an electrical crane. Electrical power is not mechanical power. The respondents raised this point in the county court, but the learned judge decided it against them.

On the construction of para. 31 I submit that "habitually" qualifies "part" as well as premises. The words "any part" omit the regulation to those parts only where a person is habitually working, and there was no evidence before the judge that any person at all had been habitually working in the place where the appellant was struck.

If the case cannot be brought under para. 17 providing for guard rails and toe-boards to prevent articles falling it would seem absurd to bring it under para. 31. If the construction contended for is correct, every part of a new building would have to be protected from falling articles and material, and not merely parts where there is any danger. The platform on which the appellant was working had only been erected on the previous day.

As to "other mechanical power" see *Wrigley* v. *Bagley & Wright and Whittaker & Sons.* (1)

Slesser L.J. This appeal succeeds. The action was brought by Mr. Kearns, a workman, against Gee, Walker & Slater, Ld., his employers, for damages for negligence. It was alleged by the workman that the employers had been guilty of a breach of a statutory regulation whereby the workman sustained injuries—not very serious ones—and the damages were agreed at 12*l.* 13*s.* 4*d.* The workman was hit on the head and back by a falling brick. What occasioned the accident was this. He was engaged by the defendants, Gee, Walker & Slater, Ld., and was employed in bricking the open part of a steel building which still required to have bricks placed in it. There was a staging erected over the particular part of the building where he was working, extending about 10 or 12 feet. On that were deposited boxes or skips of bricks, which were to be used in filling up the spaces which had been left after the steel structure had been erected. There was on the building an electric crane used for the purpose of lifting those boxes of bricks. On the day in question the plaintiff went back after lunch to work on this brickwork. A number of bricks fell from a higher part of the building and one of them hit him on the head.

It is said that in those circumstances the defendants were guilty of a breach of regulation No. 738 of the Building Regulations, 1926, made by the Secretary of State under s. 79 of the Factory and Workshop Act, 1901. If this man was injured as the result of a breach of the regulation, then,

(1) [1901] 1 K. B. 780.

according to *Groves* v. *Wimborne* (1), an action would lie with respect to personal injury caused to a workman arising from a breach of duty by his employers under the Factory and Workshop Act, 1901. The defence of common employment would not be applicable in such a case if the injury was caused by a fellow-servant

It appears from the evidence that a bricklayer was employed by the defendants on an upper floor, and that, for some reason or other, bricks did fall from that higher floor. There is no doubt that one of them hit Mr. Kearns. It is also found—and is not disputed—that there was, above the place where the plaintiff was working, no cover to protect him from being struck by any falling material. The whole question, therefore, resolves itself into this: Was there or was there not a breach of regulation?

The regulation relied on is regulation 31. But before I come to it it is logical first to deal with the opening words which cover all the paragraphs in the Regulations of 1926: "The following regulations . . . . shall apply to all premises on which machinery worked by steam, water or other mechanical power is temporarily used for the purpose of the construction of a building, or for the purpose of any addition to the structure of an existing building." On that it is interesting to observe that the mischief to which this regulation was addressed was the danger arising in the case of the construction of a building or the additions to the structure of an existing building. In other words, the Regulations contemplate that the actual building will be altered during the process of the work. It is not the case of an ordinary building which is being considered, but of a building which is being constructed or added to; and, therefore, a building which physically is in a state of change.

But it is argued by Mr. Beney that this case does not come within those preliminary words because it has been found that the crane which was used for this work was operated by electricity, and that therefore it is not "machinery worked by steam, water or other mechanical power." He says that

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(1) [1898] 2 Q. B. 402.

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the words "other mechanical power" must be construed ejusdem generis with steam or water. There is authority, I think, supporting that view; at any rate, I accept it. And I ask myself how it influences his argument. The cases which support the view that the words "other mechanical power" must be so construed—though not considered in connection with this regulation but in respect to similar words—are *Willmott* v. *Payton* (1) and *Wrigley* v. *Bagley & Wright and Whittaker & Sons.* (2) But as I read *Willmott* v. *Payton* (1), the question which had there to be considered was whether the work done was not merely manual work, but whether, in the sense used in s. 93 of the Factory and Workshop Act, 1878, it was mechanical. I think, both on the authority of that case, and on the construction of the language of the regulation, that a distinction is drawn between machinery worked by mechanical power and machinery worked by non-mechanical or manual power. That is what is intended to be affected. But even if the narrower construction be given I am not prepared to say that a machine operated by electrical force is not as much worked by mechanical power as one worked by steam or water. It may be that in the case of steam or water it is molecular expansion which produced the power. It may be that in the case of electricity, as we are told nowadays, it is some alteration in the structure of the atoms which compose the molecules. Into this nicety I am not entitled to enter—there is no evidence about it and I cannot take judicial notice of it—but I see no reason for assuming that electrical power is not as much mechanical power as steam or water. So far the learned judge has found against Mr. Beney. And, in my opinion, he was right in thinking that these were premises on which machinery worked by mechanical power—namely, the crane—was temporarily used.

Regulation 31, which is said to have been broken, is as follows: "Any part of the premises in which any person is habitually employed shall be covered in such a manner as to protect any person who is working in that part from being

(1) [1902] 1 K. B. 237.

(2) [1901] 1 K. B. 780.

struck by any falling material or article." In my view, regulation 31 is concerned to define that part of the premises which it is necessary should be covered. Were it not for that definition it might be that there would be an obligation to cover the whole of the premises. To that extent it is a regulation in favour of the employer. It is only a part of the premises which has to be covered, and that part is any part in which any person is habitually employed.

Apparently not only the plaintiff but other workmen were employed, either at the moment of the accident or thereabouts, in doing the very work which this regulation contemplated—namely, constructing a building. Taking the view which I do of the regulation, and having regard to the evidence, it is impossible to say that such persons were not habitually employed, or that the part where the crane was—which crane was there for the very purpose of enabling these persons to carry on their habitual employment in this part—was not a part of the building in which persons were habitually employed. Mr. Beney asks us to say that the word " habitually " there refers to some one who is stationary in his function rather than some one who is habitually peripatetic—pointing, for instance, to a caretaker or person in charge of a house. I see no reason so to limit the words. These persons are habitually employed in that place in constructing the building. It may be there are other parts of the premises which are not being constructed or reconstructed where work may be done which is not covered by this regulation. The learned judge, in my opinion, has taken a view different from that of Mr. Beney. I think Mr. Beney to this extent is right—when he says that what the regulation is doing is defining the part to which it applies. As I say, the learned judge has taken a different view, because he has asked himself: Ought I to find, because the plaintiff was employed for a day, or for one-and-a-half days, that he was habitually employed there? In my view, that is an error. The question is not whether the plaintiff was employed there, but, under the Regulations, whether "any part of the premises in which any person is habitually employed" has been "covered in such a manner as to protect any person who is working in that part from being struck." The person who is working in that part need not be "habitually employed" there. It is sufficient if he is working in that part for him to be entitled to protection "from being struck by any falling material or article."

For these reasons I am of opinion that the learned judge was wrong, and that the plaintiff, having been struck while he was working in a part where persons were habitually employed, was injured as the result of a breach by the employer of regulation 31. Consequently it matters not whether his injury was or was not caused through common employment, because according to the authority of *Groves* v. *Wimborne* (1) he is entitled to maintain his action against the employer for the injury done to him. The appeal, therefore, will be allowed, with costs.

SCOTT L.J. I agree, and I add nothing to what Slesser L.J. has said on the meaning of the phrase "other mechanical power." It would be ridiculous in these days to suppose that electricity was not included in the list of mechanical powers to which the Factory Acts relate.

With regard to regulation No. 31, I think that the object of the regulation is, on the one hand, to give protection to persons employed from the risk of falling objects, and, on the other hand, not to put an unnecessary burden on the employer. For that reason, while imposing an absolute duty where in the opinion of the Secretary of State it is necessary, it does not impose a duty in parts of the premises where in the opinion of the Secretary of State it is not necessary. The distinction adopted by the Secretary of State in framing the Regulations is this: Where in a factory or premises building operations are going on of the type which brings them within the Regulations generally, those parts of the premises where there are persons habitually employed are to be covered; those parts where persons are not habitually employed need not be covered. It follows that if anybody in employment goes to a part where there are persons habitually employed

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and is hit, he has his remedy, and the employer will have committed an offence under the Regulations; if, on the other hand, the place where the accident happens is a place where persons are not habitually employed, and it is an exceptional thing, if a particular person is in that spot for a moment, then there is no offence, and that particular person gets no right of action for breach of statutory duty. That is how I understand the distinction adopted. How far it is practicable to apply it in practice, how far it is easy to say whether or not the part of the building in question is one where persons are habitually employed or not, is a matter which we need not consider; hard or easy, it is the distinction which has been adopted by the Legislature. The learned judge has misinterpreted the Regulations, and for the reasons already given, the appeal ought to be allowed.

EVE J. I have arrived at the same conclusion. In my opinion, there has been a breach of regulation 31, and in those circumstances the appeal must be allowed. With regard to the regulation, it is as well if one can arrive at a construction which will give effect to all that is to be found in it. In my opinion, that follows from the language in which I propose to hold that this regulation ought to be construed: Any part of the premises wherein any person is habitually employed must be so covered in as to protect any person working in that part from being struck by any falling material or article. It is quite obvious in this case there had been no such protection afforded, and in these circumstances the appeal ought to be allowed.

Solicitors: *W. H. Thompson; Barlow, Lyde & Gilbert.*

H. L. L.

1936
Oct. 21.

DOLBY *v.* HALMSHAW.

Revenue—Licence to kill game—Hares—Exception—" Coursing with greyhounds "—Hare chased and killed by two greyhounds—No organized coursing—Game Licences Act, 1860 (23 *&* 24 *Vict. c.* 90), *ss.* 4, 5.

The respondent was charged with having killed a hare, when he had no licence to kill game, as required by s. 4 of the Game Licences Act, 1860. The respondent owned three greyhounds, which he kept for coursing and sport. On the day of the alleged offence he was riding his horse in a field, with the permission of the owner, and had with him two of his greyhounds. There were no other persons or dogs present. The two greyhounds chased a hare, overtook and killed it. Thereupon the respondent galloped across the field to where the greyhounds were, picked up the hare, put it in a bag, and placed the bag in the bottom of a hedge:—

Held, that these facts constituted the killing of a hare by coursing with greyhounds within the meaning of the third exception in s. 5 of the Game Licences Act, 1860, which excepted from the duties and provisions of that Act: " (3.) the pursuing and killing of hares . . . . by coursing with greyhounds, ... "

Held, therefore, that the justices were right in acquitting the respondent.

The exception is not restricted to any organized sport of coursing hares.

Rex (*Nevin*) v. *Clarke* [1930] N. I. 174 not followed.

CASE stated by justices of Lindsey, Lincolnshire.

The appellant, Dolby, a revenue officer, had preferred an information against the respondent, Halmshaw, charging him with having killed game, namely, a hare, he not then being in possession of a licence to kill game, contrary to the Game Licences Act, 1860, s. 4. (1)

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(1) Game Licences Act, 1860 (23 & 24 Vict. c. 90), s. 4: " Every person before he shall in Great Britain take, kill, or pursue, or aid or assist in any manner in the taking, killing, or pursuing by any means whatever, or use any dog . . . . for the purpose of taking, killing, or pursuing any game . . . . shall take out a proper licence to kill game under this Act, and pay the duty hereby made payable thereon; and if any person shall do any such act as hereinbefore mentioned in Great Britain without having duly taken out and having in force such licence as aforesaid, he shall forfeit the sum of 20*l*."

Sect. 5: " The following exceptions and exemptions from the duties and provisions of this Act are hereby made and granted; (that is to say,) . . . . (3.) The pursuing and killing of hares respectively by coursing with greyhounds, or by hunting with beagles or other hounds."

The respondent was the owner of three greyhounds, which he kept for coursing and sport. He was in the habit of coursing them at informal meetings with his friends, but not at formal meetings. On November 9, 1935, he was riding his horse in a field of savoys, with the permission of the owner. He had with him two of his greyhounds. There were no other persons or dogs present. The two greyhounds chased a hare, overtook, and killed it. Thereupon the respondent galloped across the field to where the greyhounds were, picked up the hare, put it in a bag, and placed the bag in the bottom of a hedge. The respondent had not taken out a licence to kill game.

On the part of the appellant it was contended that these facts did not constitute coursing; that the exception in s. 5 of the Game Licences Act, 1860 (1), only applied to organized coursing meetings; that, in coursing, the comparative trial of dogs and not the catching of the hare pursued, was the main object; that it was not the object of the exception to permit the killing of game, but to permit, without a licence, coursing, which meant the matching of dogs.

On the part of the respondent it was contended that coursing meant any hunting of hares with greyhounds and was the sport of hunting with greyhounds by sight.

The justices were of the opinion that the coursing, within the meaning of the exception, meant the pursuing of hares by greyhounds not solely at coursing meetings, but also for sport other than that of a man going out with a single greyhound to pick up what game he could get, and also by way of training of greyhounds, that the acts of the respondent were consistent with his testing one greyhound against the other, and that the respondent was coursing with greyhounds within the meaning of the third exception in s. 5, and dismissed the information.

The revenue officer appealed.

T. N. Winning for the appellant. The justices were wrong in dismissing the information. The question is whether what

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(1) Ante, p. 196.

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the respondent was doing at the time in question was " coursing with greyhounds " within the meaning of the third exception in s. 5 of the Game Licences Act, 1860, which excepted from the duties and provisions of that Act " the pursuing and killing of hares . . . . by coursing with greyhounds. . . . ." There is no English authority on the point, and it is desired to have the ruling of the Court on the construction of this exception. The exception has been considered in Northern Ireland, in *Rex* (*Nevin*) v. *Clarke* (1), where the defendant was said to have coursed a hare with a single greyhound with the written permission of the owner of the land to do so. Moore L.C.J. held that the words " coursing with greyhounds " referred to the well known sport of coursing and that it did not apply to a man going out with a single greyhound. The owner of the greyhound must be employed in the sport of coursing. Brown J. in the same case said that " coursing with greyhounds " in the exception referred to the coursing of hares in an organized way. It is submitted that the respondent in this case was not " coursing with greyhounds," within the meaning of the third exception in s. 5, and that he had committed an offence against s. 4 of the Act of 1860 by using his greyhounds to chase, pursue and kill a hare without having taken out a proper licence to kill game.

W. T. Monckton K.C. and *C. L. Henderson* for the respondent were not called on.

LORD HEWART C.J. This appeal ought to be dismissed. The respondent was prosecuted for unlawfully killing a hare when he had no licence to kill game, contrary to the Game Licences Act, 1860, s. 4. The answer which was made on behalf of the respondent was that what he was doing came within one of the exceptions in s. 5 of the Act of 1860. The exception relied on is "The pursuing and killing of hares respectively by coursing with greyhounds, or by hunting with beagles or other hounds." The justices were of the opinion, on the facts, that the respondent was coursing with greyhounds within that exception.

(1) [1930] N. I. 174, 180, 181.

The respondent was riding his horse in a field and had two of his greyhounds with him. There were no other persons or dogs present. The two greyhounds chased a hare in the field, overtook it, and killed it. The respondent then went across to the place where the greyhounds were and picked up the hare. The contention on behalf of the appellant was that those facts did not constitute coursing with greyhounds within the meaning of the third exception in s. 5 of the Game Licences Act, 1860, and that that exception applied only to organized coursing meetings. On the part of the respondent it was contended that coursing meant any hunting of hares with greyhounds and was the sport of hunting with greyhounds by sight, and that the coursing need not be at an organized meeting to be within the meaning of the exception.

The opinion of the justices was that coursing within the meaning of the exception meant the pursuing of hares by greyhounds not solely at coursing meetings, but also for sport other than that of a man going out with a single greyhound to pick up what game he could get, and also by way of training the greyhounds, that the acts of the respondent were consistent with his testing one dog against the other, and that the respondent was coursing with greyhounds within the meaning of the exception.

Our attention has been directed to a case in Northern Ireland of *Rex* (*Nevin*) v. *Clarke* (1), where the defendant, it was said, coursed a hare with a single greyhound with the written permission of the owner of the land so to do. Moore L.C.J. said (2): "The words 'coursing with greyhounds' refer to the well known sport of coursing. I do not think that it applies to a man going out with a greyhound, picking up what he could get. If that was the meaning of coursing, namely, going out with a single dog, why should not all other dogs be included also, such as a lurcher? The owner of the greyhound must be employed in the sport of coursing."

It is difficult to reconcile that judgment with the scheme of s. 5 of the Act of 1860, in which a series of exceptions and exemptions are set out. To leave aside the exemptions which

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(1) [1930] N. I. 174.

(2) Ibid. 180.

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refer to persons, the exceptions are, first: "The taking of woodcocks and snipes with nets or springs in Great Britain," secondly: "The taking or destroying of conies in Great Britain by the proprietor of any warren"; and then the exception with which we are at the moment concerned—namely: "The pursuing and killing of hares respectively by coursing with greyhounds, or by hunting with beagles or other hounds"; and finally "The taking and killing of deer in any inclosed lands by the owner or occupier of such lands, or by his direction or permission."

I find it a little difficult to perceive why this third exception should be restricted to a well known sport. What is meant by "a well known sport"? I think the matter is put, if I may say so, perfectly clearly by the other learned judge in the Irish Court—Brown J., who said (1): "In my opinion such coursing as has been disclosed was not within the exception, which refers to the coursing of hares in an organized way." Where does one find any language indicating some "organized way" in this exception? If the Legislature had intended to limit the coursing which was excepted to a coursing in an organized way, nothing would have been easier than to say so.

It seems to me that on the facts of this case the justices were entitled to say that what had taken place was the killing of a hare by coursing with greyhounds, and that they rightly acquitted the respondent.

BRANSON J. I agree.

DU PARCQ J. I also agree.

Appeal dismissed.

Solicitors for the appellant: *Taylor, Jelf & Co., for Eric W. Scorer, Lincoln.*

Solicitors for the respondent: *Ellis & Ellis, for W. Bains, Brigg.*

T. W. M.

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(1) [1930] N. I. 181.

THE KING *v.* CAMBRIDGE COUNTY COUNCIL.

Ex parte RIVER GREAT OUSE CATCHMENT BOARD.

1936
Oct. 28.

Rates and rating—Catchment board—Precept to council for apportioned amount of expenses—Estimated amount which would be produced by a rate of twopence in the pound—Method of calculation—"Estimated amount"—Land Drainage Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *s.* 20, *sub-s.* 1 (*b*); *s.* 22, *sub-s.* 2.

By s. 22, sub-s. 2, of the Land Drainage Act, 1930, the aggregate apportioned amount which may be demanded by a catchment board from a county council for its expenses is not to exceed "the estimated amount which would be produced by a rate of twopence in the pound" on certain rateable values. The catchment board demanded an amount calculated by multiplying the rateable values in pounds by 2*d*., without making any deductions for cost of collection or for losses on collection:—

Held, that this calculation was an "estimate," and that the amount demanded had been estimated by the correct method within the meaning of the sub-section.

Per Lord Hewart C.J. It is fallacious to suggest that, in order that a calculation may properly fulfil the character of an estimate, there must be in it some ingredient of necessary inaccuracy and uncertainty.

Rule nisi for mandamus.

The rule was directed to the Cambridge County Council calling on them to show cause why they should not pay to the applicants, the River Great Ouse Catchment Board, the sum of 126*l*. 7*s*. 11*d*., balance of a sum of 7073*l*. 18*s*. 8*d*. demanded of them by a precept issued by the board on September 6, 1935, under s. 22, sub-s. 1, of the Land Drainage Act, 1930 (1), being the amount of the expenses under the Act of the board apportioned upon the council under s. 20, sub-s. 1 (*b*), of the Act (1).

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(1) Land Drainage Act, 1930 (20 & 21 Geo. 5, c. 44), s. 20, sub-s. 1: "Subject to the provisions of this Part of this Act, the expenses under this Act of a catchment board in so far as they are not met otherwise shall (*a*) if the catchment area is wholly comprised within, or is co-terminous with, one administrative county, be paid to the board by the council of that county; and (*b*) in any other case, be apportioned by the board among the councils of the several counties and county boroughs which are situate within, or extend into, the catchment area on the basis of the totals of the

The figures upon which the amounts demanded were based were not in issue, and are not material to this report.

The sum claimed by the board from the Cambridge County Council was based on the total of the rateable values in pounds multiplied by 2*d.* The amount tendered and paid by the council was based on the produce of a rate calculated as above, but subject to a deduction for losses in collection and the cost of collection.

van den Berg K.C. and *Gerald Howard* showed cause. The effect of what the applicants have done is not to make an estimate at all, but merely to make a mathematical calculation —so many pounds multiplied by 2*d.* To be an estimate the amount must be calculated on the same basis as that adopted by the applicants, but less the amount of losses in collection and the cost of collection. Sect. 22, sub-s. 2, of the Act of 1930 (1) speaks of the amount " produced " by a rate, and that must mean the net product. The words of s. 22, sub-s. 2, " estimated amount which would be produced by a rate " were not new in 1930. Five years before, s. 9, sub-s. 2 (*d*), of the Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), spoke of " estimate of the amount, calculated in the prescribed manner, which would be produced in the next financial year by a rate of a penny in the pound," and in r. 3 of the Rating and Valuation Act (Product of Rates and Precepts) Rules, 1926 (S. R. & O., 1926, No. 921), made under s. 9, sub-s. 4, and s. 58 of the Act of 1925, and in pursuance of it, " the product of a penny rate . . . . shall be calculated by deducting from

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rateable values of all such hereditaments in the respective areas of those councils as are situate within the catchment area."

By s. 22, sub-s. 1, a catchment board may issue precepts requiring payment of amounts apportioned upon county councils and county borough councils.

Sub-s. 2: " The aggregate amount which may be demanded under this Part of this Act in any one financial year by a catchment board from the council of any county or county borough shall not, except with the consent of the majority of those members of the catchment board who are appointed by the councils of counties and county boroughs, exceed the estimated amount which would be produced by a rate of twopence in the pound levied on that part of the county or county borough which is within the catchment area. . . . "

(1) Ante, p. 201.

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the gross rate . . . . the cost of collection and the loss on collection"; and by r. 1, sub-r. 2, "'product of a penny rate' means the amount produced by a rate of one penny in the pound." The words "estimated amount which would be produced by a rate of twopence in the pound" in s. 22, sub-s. 2, of the Act 1930, should receive the same interpretation.

Montgomery K.C. and *Hubert Hull* for the applicants were not called upon to argue.

LORD HEWART C.J. This is a rule nisi for a writ of mandamus to be directed to the council of the administrative county of Cambridge "commanding them pursuant to the statutes in that behalf to pay to the River Great Ouse Catchment Board the sum of 126*l.* 7*s.* 11*d.*, being the balance of a sum of 7073*l.* 18*s.* 8*d.* demanded of the said council under a precept issued by the said catchment board on or about 6th September, 1935." There are two grounds stated in the rule. The first is: "That on September 5, 1935, and under and in pursuance of section 22 of the Land Drainage Act, 1930, the said catchment board issued a precept to the said council requiring the payment of the sum of 7073*l.* 18*s.* 8*d.* being the amount apportioned upon the said council under section 20 of the said Act," and the second ground is: "That the said council have paid to the said catchment board the sum of 6947*l.* 10*s.* 9*d.* under the said precept but have wrongfully neglected and refused and still neglect and refuse to pay to the said catchment board the balance of the sum due thereunder, that is to say, the sum of 126*l.* 7*s.* 11*d.*"

The controversy, which, if I may say so, has been very ably explained in the argument of Mr. van den Berg, and conducted with great ability in the correspondence that passed in the year 1932 between the clerk of the catchment board on the one hand and the clerk of the county council on the other hand, turns upon the meaning of an expression in s. 22, sub-s. 2, of the Land Drainage Act, 1930. The scheme of the Act is plain enough. In Part IV, which has to do with financial provisions, it is provided by s. 20, sub-s. 1, that under the Act the expenses of a catchment board, in so far as not otherwise met, shall—and

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then what is dealt with first is the case "(*a*) if the catchment area is wholly comprised within, or is co-terminous with, one administrative county," which is not this case—and, secondly, "(*b*) in any other case, be apportioned by the board among the councils of the several counties and county boroughs which are situate within, or extend into, the catchment area on the basis of the totals of the rateable values of all such hereditaments in the respective areas of those councils as are situate within the catchment area." That is the basis, and it is provided accordingly by s. 20, sub-s. 4: "The councils of the several counties and county boroughs which are situate within or extend into the catchment area of a catchment board shall, from time to time, if and when so required by the catchment board, furnish to the catchment board a true and correct statement of the totals of the rateable values of all such hereditaments in the respective areas of those councils as are situate within the catchment area of the catchment board." There, then, is an express and clear provision as to the nature of the information which, in order to enable the apportionment to be made, must, upon request, be supplied from the several counties and county boroughs to the catchment board. Then follows s. 22, with regard to the issue of precepts by the board, as follows: "A catchment board may issue precepts to the councils of counties and county boroughs and to internal drainage boards requiring payment of any amount payable by, apportioned upon, or required to be contributed by those councils and boards under either of the two last preceding sections, and, subject to the provisions of sub-s. 2 of this section, a council or an internal drainage board shall pay, in accordance with any precept so issued to it, the amount thereby demanded." Next comes the important sub-section out of which this controversy has arisen, and the sub-section is in these terms: "(2.) The aggregate amount which may be demanded under this Part of this Act in any one financial year by a catchment board from the council of any county or county borough shall not, except with the consent of the majority of those members of the catchment board who are appointed by the councils of counties and county boroughs, exceed the estimated amount which would be produced by a rate of twopence in the pound levied on that part of the county or county borough which is within the catchment area." That is the expression upon which the discussion has turned, " the estimated amount which would be produced by a rate of twopence in the pound levied," etc.

What do those words mean? It is to be observed that what is being set out here is the maximum which is not to be exceeded. The catchment board may not require more, but it does not follow that it will require so much. The limit to that which may be asked is " the estimated amount which would be produced by a rate of twopence in the pound."

What was it that happened in this case? The several pieces of information from the different counties and county boroughs were supplied. The statement of the totals of the rateable values for the areas concerned was duly arrived at. There then came into existence what is called in s. 20, sub-s. 1 (*b*), the basis which was to found the calculation, the basis contained in the totals of the rateable values of those hereditaments. The catchment board, then having in its possession the information which supplied the statutory basis, proceeded to calculate the maximum, after the rate of twopence in the pound upon the total of rateable value.

It is argued on the part of the Cambridge County Council that to proceed in that fashion, whatever else it was, was not to proceed upon an estimate; on the contrary, it is said that, to proceed upon a mere mathematical calculation by the application of the figure of 2*d.* to the total rateable value, is not really an estimate, but rather is a calculation which arrives at a precise and merely mathematical result. That, I think, is the argument of the Cambridge County Council. But that seems to involve, if I may say so, the fallacious suggestion that, in order that a calculation may properly fulfil the character of an estimate, there must be in it some ingredient of necessary inaccuracy and uncertainty. I cannot possibly take that view. The amount which is spoken of is undoubtedly an estimated amount of the product of the rate. But when one reflects that what was being dealt with was

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not the product of a rate in a past year but the product expected from a rate in a future year, and that that matter is being looked at for the mere purpose of fixing the maximum, I think that a calculation carried out in the manner prescribed contains all the features of an estimate. It cannot be actual, because it is an anticipation of the future. It would be idle to say " the amount produced " by a rate of 2*d.* in the pound, because the amount produced last year may be different from the amount to be produced next year ; and as this maximum is to be ascertained by a calculation of what is to happen in the future, it seems to me to be nothing to the point to say that it has been ascertained by taking the total rateable value and multiplying the figure of the pounds by the figure of 2*d.* In my opinion, the learned clerk to the catchment board answered the crux of the matter very neatly in the last paragraph of his letter dated April 9, 1932. Mr. van den Berg appeared to have difficulty in appreciating the meaning of this paragraph. But, with great respect, I should have thought the meaning was sufficiently plain. The clerk of the board wrote : " It seems that the words ' estimated amount which would be produced ' by a 2*d.* rate can be accounted for by the fact that under s. 20, sub-s. 2, the rateable value on which the expenses are to be apportioned is fixed as that shown on the first day of the account period, but clearly when it comes to a question of the rating authorities actually raising the money the valuation list on which they levy their rate may have altered since the date of the precept, and therefore the figures which the catchment board are bound to use are in fact only estimated and cannot in any case be actual." That seems to me to be a very pertinent observation. Really, the argument to the contrary is not, when one analyses it, that this result is not the result of an estimate, but the argument is that the estimate has been arrived at in a way to which the Cambridge County Council desires to take exception.

What is the alternative which is suggested ? It is based on this, that under the Rating and Valuation Act, 1925, and the Rating and Valuation Act (Product of Rates and

Precepts) Rules, 1926 (S. R. & O., 1926, No. 921), made in pursuance of it, the expression "estimated amount which would be produced by a rate" was familiar five years before the passing of the Land Drainage Act, 1930. In s. 9, sub-s. 2 (*d*), of the Rating and Valuation Act, 1925, one finds these words: "For the purpose of enabling councils of counties and boards of guardians to issue their precepts in manner required by this sub-section, every rating authority shall before the first day of February in each year transmit to every county council and board of guardians having power to issue a precept to that rating authority an estimate of the amount, calculated in the prescribed manner, which would be produced in the next financial year by a rate of a penny in the pound levied in the rating area or part thereof, as the case may be," and it is suggested that those words, "the amount . . . . which would be produced in the next financial year by a rate," if not a term of art, were at any rate so familiar five years after the Rating and Valuation Act, 1925, that they ought to be taken as the meaning of the words "estimated amount which would be produced by a rate" in s. 22, sub-s. 2, of the Land Drainage Act, 1930. It is an ingenious argument; but it is to be observed that the Rating and Valuation Act, 1925, is not only a different statute but is a statute enacted alio intuitu, and it is careful, when it is describing how that estimate is to be arrived at, to introduce the words "calculated in the prescribed manner." If the words "estimated amount which would be produced by a rate of *2d.* in the pound" in the Act of 1930 ought to be expanded into some such expression as this, "the amount estimated by the several rating authorities concerned as likely to be produced by a rate of *2d.* in the pound," a great element of uncertainty must of necessity be produced. Non constat that any two rating authorities would arrive at their estimate in the same way; non constat that, in dealing with the factors, for example, of bad debts and cost of collection, any clear rule would universally or generally be applied and the matter would be wholly out of the hands of the catchment board itself. I do not think that any assistance can be got from attempting to read into s. 22, sub-s. 2, of the Land Drainage Act, 1930, anything from the Rating and Valuation Act, 1925. These later words seem to me to mean exactly what they say, and the persons who are being spoken of are the members of the catchment board. They, I think, are to make the estimate, and they are to make the estimate upon the materials which they have, and part of those materials is the statement, which at any time they may ask for, relating to the totals of the rateable values in the several areas. It matters not, I think, that having those materials and being engaged—and this, I think, is a vital matter—upon the task of fixing a maximum and not any other amount, they have taken the total rateable value, multiplied it by two, and so arrived at their sum in pence. The ingredient which differentiates an estimate from an actual calculation is, I think, clearly supplied by the fact, from which there is no escape, that the board, when it makes its calculation, no matter by what method it makes it, is seeking to dip into the future and must have regard, not to the product of the rate in some preceding year, but to the estimated amount which the rate would be likely to produce in a year in future.

I think, therefore, that, ingenious as is the argument which has been made by Mr. van den Berg, and the argument which is adumbrated in this excellent correspondence, the construction contended for by the catchment board is right, and that this rule ought to be made absolute.

SWIFT J. I agree, and I have nothing to add.

DU PARCQ J. I also agree, and for the same reasons.

Rule absolute.

Solicitors showing cause: *Vincent & Vincent, for A. Tabrum, Cambridge.*

Solicitors in support: *Simmons & Simmons, for E. T. L. Baker, Cambridge.*

W. L. L. B.

WARNER BROTHERS PICTURES, INCORPORATED *v.* NELSON.

1936
Oct. 14, 15, 16, 19.

[1936. W. No. 2785.]

Injunction—Contract of personal service—Film artist—Covenant not to perform for others—Damages as alternative remedy.

The defendant, a film artist, entered into a contract with the plaintiffs, film producers, for fifty-two weeks, renewable for further periods of fifty-two weeks at the option of the plaintiffs, whereby she agreed to render her exclusive services as such artist to the plaintiffs, and by way of negative stipulation not, during the period of the contract, to render such services to any other person. In admitted breach of this agreement the defendant entered into a contract to perform as a film artist in this country for a third person :—

Held, that the effect of the contract was not to drive the defendant either to specific performance or to idleness, so that an injunction would in effect enforce a contract to perform personal services. The criterion was not the difference between what the defendant could earn as a film artist and what she could earn in other ways ; she might be tempted, but would not be compelled, to perform the contract.

Held, also, that damages were not an appropriate alternative remedy and that an injunction must be granted, but limited as to period in terms which the Court, in its discretion, thought reasonable.

Lumley v. *Wagner* (1852) 1 De G. M. & G. 604 followed.

ACTION tried by Branson J.

The plaintiffs, Warner Bros. Pictures, Inc., film producers in the United States, claimed an injunction, as drafted by the plaintiffs during the hearing, against the defendant, Mrs. Nelson, professionally known as Bette Davis, a film artist, to restrain her within the jurisdiction of the Court " during the currency of [her contract with the plaintiffs] from rendering without the written consent of the plaintiffs . . . . any services for or in any motion picture or stage production or productions of any person firm or corporation other than the plaintiffs."

On December 27, 1934, the defendant entered into a contract in the United States with the plaintiffs for fifty-two weeks which, if the plaintiffs exercised options provided for therein, might extend it to 1942. The defendant thereby agreed "to render her exclusive services as a motion picture and/or legitimate stage actress" to the producer [the plaintiffs] and to perform solely and exclusively for them. The contract further contained the negative stipulation that "she will not, during [the term of the contract] render any services for or in any other phonographic, stage or motion picture production or productions or business of any other person . . . . or engage in any other occupation without the written consent of the producer being first had and obtained." As appears above the injunction as finally drafted did not embody this last clause.

A further clause provided that if the defendant failed to perform her services under the contract, the plaintiffs "have the right to extend the term of this agreement and all of its provisions for a period equivalent to the period during which such failure . . . . shall be continued." The plaintiffs, however, during the hearing, undertook not to exercise their right of suspension under this clause as from October 16, 1936.

In June, 1936, the defendant, in admitted breach of the contract, declined to be further bound by it, and came to this country and entered into an agreement to appear as a film artist with a third person. The defendant did not give evidence.

The plaintiffs then brought this action.

Sir Patrick Hastings K.C., *Norman Birkett* K.C., and *Frank Gahan* for the plaintiffs. This contract is in common form and the case is of great importance to the film industry. In effect the defendant has torn up her contract and is saying: "Nevertheless, you cannot get an injunction." No doubt it is the law that the Court will not grant specific performance of a contract of personal service. But that is not what the plaintiffs are asking. They are asking that a person of particular qualifications engaged in a particular class of personal service shall keep her contract not to work for any one else in that way. Here damages would not be a proper or more convenient remedy, for they would be difficult to assess, and, moreover, difficult to recover from an artist.

Sir William Jowitt K.C., *J. D. Cassels* K.C., and *J. L. S. Hale* for the defendant. It is admitted that the defendant has acted in breach of her contract, and no doubt breach of contract is a serious matter. But a time may come when one of the parties to a contract may have to say: "I cannot carry out my contract, and must submit to the penalties imposed by law." In *De Francesco* v. *Barnum* (1) Fry J. said: "I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. . . . I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery." He found the particular contract unreasonable, and refused to enforce it by injunction. The present contract makes the defendant a mere chattel of the plaintiffs. Slavery is not the less slavery because the chains are gilded. In *Lumley* v. *Wagner* (2), the foundation of this branch of the law, the Court refused to enforce by injunction a contract to sing for the plaintiff but enforced her agreement not to sing for anybody else. In *Whitwood Chemical Co.* v. *Hardman* (3) Lindley L.J. said he looked on *Lumley* v. *Wagner* (2) as an anomaly and a decision it would be dangerous to extend. To grant the injunction here would be to extend that case further than it has ever been extended. This Conc. contract is negative in form but affirmative in substance, and the Court will not enforce it by injunction: *Davis* v. *Foreman* (4); *Kirchner* v. *Gruban* (5); *Chapman* v. *Westerby*. (6) Practically, to grant the injunction would be to enforce an agreement for personal services, for, unless the defendant performs for the plaintiffs, she must be idle, possibly until 1942. Moreover by the agreement she cannot engage "in any other occupation" without the plaintiffs' consent: see per Romer J. in *Ehrman* v. *Bartholomew* (7)—and the covenants are not severable: *Attwood* v. *Lamont*. (8) The covenants in *Rely-a-Bell Burglar*

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(1) (1890) 45 Ch. D. 430, 438.
(2) (1852) 1 De G. M. & G. 604.
(3) [1891] 2 Ch. 416, 428.
(4) [1894] 3 Ch. 654.
(5) [1909] 1 Ch. 413.
(6) [1913] W. N. 277.
(7) [1898] 1 Ch. 671, 674.
(8) [1920] 3 K. B. 571.

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and Fire Alarm Co. v. *Eisler* (1) were very similar to the present ones, and the Court refused to say: " You must work for the plaintiffs or starve." Injunction is a discretionary remedy and will only be granted if reasonably necessary—*William Robinson & Co.* v. *Heuer* (2)—and here there is the alternative remedy of damages.

[*Gaumont-British Picture Corporation* v. *Alexander* (3) was also referred to.]

Had these covenants been made applicable to the period after the termination of the contract clearly they would have been bad. Here, where the relation of master and servant exists de jure but not de facto the same principle should apply: Halsbury's Laws of England, vol. 27, Art. Trade and Trade Union, para. 1080, p. 556. There is here no appropriate negative covenant by the defendant containing a prohibition against doing something upon which the Court can put its finger; it is only a general prohibition against working. Damages would be easily recoverable against so well paid an artist as the defendant. If the injunction is granted and the defendant has to work for the plaintiffs, the position will be intolerable for both parties.

Sir Patrick Hastings K.C. in reply. There is here a negative covenant, made for valuable consideration by the defendant with her eyes open, that she will not do a particular thing, and the Court has no discretion to exercise but will give its sanction to that which is the contract of the parties: see per Lord Cairns in *Doherty* v. *Allman.* (4) That is subject to the qualification that the Court cannot be required to grant specific performance of a covenant to render personal services. The plaintiffs are only asking that the defendant should be enjoined not to do what she has contracted not to do, and not to act in competition with the plaintiffs. The covenants are severable—*William Robinson & Co.* v. *Heuer* (2)—and the Court can grant the injunction in the terms set out.

Cur. adv. vult.

(1) [1926] Ch. 609.
(2) [1898] 2 Ch. 451.
(3) (1936) 2 A. E. Rep. 1686.
(4) (1878) 3 App. Cas. 709, 719.

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1936. Oct. 19. BRANSON J. The facts of this case are few and simple. The plaintiffs are a firm of film producers in the United States of America. In 1931 the defendant, then not well known as a film actress, entered into a contract with the plaintiffs. Before the expiration of that contract the present contract was entered into between the parties. Under it the defendant received a considerably enhanced salary, the other conditions being substantially the same. This contract was for fifty-two weeks and contains options to the plaintiffs to extend it for further periods of fifty-two weeks at ever-increasing amounts of salary to the defendant. No question of construction arises upon the contract, and it is not necessary to refer to it in any great detail; but in view of some of the contentions raised it is desirable to call attention quite generally to some of the provisions contained in it. It is a stringent contract, under which the defendant agrees "to render her exclusive services as a motion picture and/or legitimate stage actress" to the plaintiffs, and agrees to perform solely and exclusively for them. She also agrees, by way of negative stipulation, that "she will not, during such time"—that is to say, during the term of the contract—"render any services for or in any other phonographic, stage or motion picture production or productions or business of any other person . . . . or engage in any other occupation without the written consent of the producer being first had and obtained."

Cancl.

With regard to the term of the contract there is a further clause, clause 23, under which, if the defendant fails, refuses or neglects to perform her services under the contract, the plaintiffs "have the right to extend the term of this agreement and all of its provisions for a period equivalent to the period during which such failure, refusal or neglect shall be continued."

In June of this year the defendant, for no discoverable reason except that she wanted more money, declined to be further bound by the agreement, left the United States and, in September, entered into an agreement in this country with a third person. This was a breach of contract on her part, and the plaintiffs on September 9 commenced this action

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claiming a declaration that the contract was valid and binding, an injunction to restrain the defendant from acting in breach of it, and damages. The defence alleged that the plaintiffs had committed breaches of the contract which entitled the defendant to treat it as at an end; but at the trial this contention was abandoned and the defendant admitted that the plaintiffs had not broken the contract and that she had; but it was contended on her behalf that no injunction could as a matter of law be granted in the circumstances of the case.

At the outset of the considerations of law which arise stands the question, not raised by the pleadings but urged for the defendant in argument, that this contract is unlawful as being in restraint of trade. The ground for this contention was that the contract compelled the defendant to serve the plaintiffs exclusively, and might in certain circumstances endure for the whole of her natural life. No authority was cited to me in support of the proposition that such a contract is illegal, and I see no reason for so holding. Where, as in the present contract, the covenants are all concerned with what is to happen whilst the defendant is employed by the plaintiffs and not thereafter, there is no room for the application of the doctrine of restraint of trade.

A similar contract came before the Courts in the case of *Gaumont-British Picture Corporation, Ld.* v. *Alexander* (1), and was upheld by Porter J. I respectfully agree with his view.

I turn then to the consideration of the law applicable to this case on the basis that the contract is a valid and enforceable one. It is conceded that our Courts will not enforce a positive covenant of personal service; and specific performance of the positive covenants by the defendant to serve the plaintiffs is not asked in the present case. The practice of the Court of Chancery in relation to the enforcement of negative covenants is stated on the highest authority by Lord Cairns in the House of Lords in *Doherty* v. *Allman.* (2) His Lordship says: " My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a

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(1) 2 A. E. Rep. 1686.

(2) 3 App. Cas. 709, 719.

Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."

That was not a case of a contract of personal service; but the same principle had already been applied to such a contract by Lord St. Leonards in *Lumley* v. *Wagner*. (1) The Lord Chancellor used the following language: "Wherever this Court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a Judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity." This passage was cited as a correct statement of the law in the opinion of a strong Board of the Privy Council in the case of *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (2), and I not only approve it, if I may respectfully say so, but am bound by it.

The defendant, having broken her positive undertakings in the contract without any cause or excuse which she was

(1) 1 De G. M. & G. 604, 619.

(2) [1926] A. C. 108, 125.

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prepared to support in the witness-box, contends that she cannot be enjoined from breaking the negative covenants also. The mere fact that a covenant which the Court would not enforce, if expressed in positive form, is expressed in the negative instead, will not induce the Court to enforce it. That appears, if authority is needed for such a proposition, from *Davis* v. *Foreman* (1); *Kirchner* v. *Gruban* (2); and *Chapman* v. *Westerby*. (3) The Court will attend to the substance and not to the form of the covenant. Nor will the Court, true to the principle that specific performance of a contract of personal service will never be ordered, grant an injunction in the case of such a contract to enforce negative covenants if the effect of so doing would be to drive the defendant either to starvation or to specific performance of the positive covenants: see *Whitwood Chemical Co.* v. *Hardman* (4), where Lindley L.J. said: "What injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement?"; *Ehrman* v. *Bartholomew* (5), where the injunction was refused, firstly, on the ground that it was doubtful whether the covenant applied at all, and, secondly, on the ground that to grant it would compel the defendant wholly to abstain from any business whatsoever; and *Mortimer* v. *Beckett* (6), where there was also no negative stipulation.

The case of *Rely-a-Bell Burglar and Fire Alarm Co., Ld.* v. *Eisler* (7), which was strongly relied upon by the defendant, falls within the same category as *Ehrman* v. *Bartholomew* (5) and *Chapman* v. *Westerby*. (3) Russell J., as he then was, said (8), after citing those two cases: "It was said on the other side that there were points of distinction. It was said that the covenants in those two cases were so framed that the servant, if the covenants were enforced, could make his living neither by serving nor by carrying on business independently; whereas in the present case the covenant only prohibited serving. Therefore, it was said, he was still free to start in business on his own account, and it could not be said, if an injunction were granted in the terms of the covenant, that he would be forced to remain idle and starve. That distinction seems to me somewhat of a mockery. It would be idle to tell this defendant, a servant employed at a wage, that he must not serve anybody else in that capacity, but that the world was still open to him to start business as an independent man. It seems to me that if I were to restrain this man according to the terms of the covenant, he would be forced to remain idle and starve." Had it not been for that view of the facts, I think that the learned Judge would have granted an injunction in that case.

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(1) [1894] 3 Ch. 654.
(2) [1909] 1 Ch. 413.
(3) [1913] W. N. 277.
(4) [1891] 2 Ch. 416, 427
(5) [1898] 1 Ch. 671.
(6) [1920] 1 Ch. 571.
(7) [1926] Ch. 609.
(8) [1926] Ch. 615.

The conclusion to be drawn from the authorities is that, where a contract of personal service contains negative covenants the enforcement of which will not amount either to a decree of specific performance of the positive covenants of the contract or to the giving of a decree under which the defendant must either remain idle or perform those positive covenants, the Court will enforce those negative covenants; but this is subject to a further consideration. An injunction is a discretionary remedy, and the Court in granting it may limit it to what the Court considers reasonable in all the circumstances of the case.

This appears from the judgment of the Court of Appeal in *William Robinson & Co., Ld.* v. *Heuer.* (1) The particular covenant in that case is set out at p. 452 and provides that "Heuer shall not during this engagement, without the previous consent in writing of the said W. Robinson & Co., Ld.," and so forth, "carry on or be engaged either directly or indirectly, as principal, agent, servant, or otherwise, in any trade, business, or calling, either relating to goods of any description sold or manufactured by the said W. Robinson & Co., Ld. . . . . or in any other business whatsoever." There are passages in the judgment of Lindley M.R. which bear so closely on several aspects of the present case that I shall refer to them. He begins his judgment by saying (2) that the result at which

(1) [1898] 2 Ch. 451.

(2) Ibid. 454.

he is arriving is that justice requires that some injunction should be granted. He goes on to say: "This defendant is avowedly breaking his agreement, and the question is whether he should be at liberty to do so." There was a question raised whether that agreement was or was not illegal, and as to that the Master of the Rolls says: "There is no authority whatever to shew that that is an illegal agreement—that is to say, that it is unreasonable, and goes further than is reasonably necessary for the protection of the plaintiffs. It is confined to the period of the engagement, and means simply this—'So long as you are in our employ you shall not work for anybody else or engage in any other business.' There is nothing unreasonable in that at all." That seems to me to apply very precisely to the present case. The Master of the Rolls continues: "When, however, you come to talk about an injunction to enforce it, there is great difficulty. The real difficulty which has always to be borne in mind when you talk about specific performance of or injunctions to enforce agreements involving personal service is this—that this Court never will enforce an agreement by which one person undertakes to be the servant of another; and if this agreement were enforced in its terms, it would compel this gentleman personally to serve the plaintiffs for the period of ten years. That the Court never does. Therefore an injunction in these terms cannot be granted, although the agreement to serve the plaintiffs and give his whole care, time, and attention to their business, and not to engage in any other business during his engagement, is valid in point of law. But the plaintiffs do not ask for an injunction in the terms of that agreement."

Before parting with that case, I should say that the Court there proceeded to sever the covenants and to grant an injunction, not to restrain the defendant from carrying on any other business whatsoever, but framed so as to give what was felt to be a reasonable protection to the plaintiffs and no more. The plaintiffs waived an option which they possessed to extend the period of service for an extra five years, and the injunction then was granted for the remaining period of unextended time.

It is said that this case is no longer the law, but that *Attwood* v. *Lamont* (1) has decided that no such severance is permissible. I do not agree. *Attwood* v. *Lamont* (1) was a case where the covenants were held void as in restraint of trade. There is all the difference in the world between declining to make an illegal covenant good by neglecting that which makes it contrary to law and exercising a discretion as to how far the Court will enforce a valid covenant by injunction. The latter was done in the Court of Appeal in *William Robinson & Co.* v. *Heuer* (2), the former in *Attwood* v. *Lamont.* (1)

The case before me is, therefore, one in which it would be proper to grant an injunction unless to do so would in the circumstances be tantamount to ordering the defendant to perform her contract or remain idle or unless damages would be the more appropriate remedy.

With regard to the first of these considerations, it would, of course, be impossible to grant an injunction covering all the negative covenants in the contract. That would, indeed, force the defendant to perform her contract or remain idle; but this objection is removed by the restricted form in which the injunction is sought. It is confined to forbidding the defendant, without the consent of the plaintiffs, to render any services for or in any motion picture or stage production for any one other than the plaintiffs.

It was also urged that the difference between what the defendant can earn as a film artiste and what she might expect to earn by any other form of activity is so great that she will in effect be driven to perform her contract. That is not the criterion adopted in any of the decided cases. The defendant is stated to be a person of intelligence, capacity and means, and no evidence was adduced to show that, if enjoined from doing the specified acts otherwise than for the plaintiffs, she will not be able to employ herself both usefully and remuneratively in other spheres of activity, though not as remuneratively as in her special line. She will not be driven, although she may be tempted, to perform the contract, and the fact that she may be so tempted is no objection to the

(1) [1920] 3 K. B. 571. (2) [1898] 2 Ch. 451.

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grant of an injunction. This appears from the judgment of Lord St. Leonards in *Lumley* v. *Wagner* (1), where he used the following language: "It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this Court had no power to compel her to perform at Her Majesty's Theatre. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the Court, and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect too of the injunction, in restraining J. Wagner from singing elsewhere may, in the event"—that is a different matter—"of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre: the injunction may also, as I have said, tend to the fulfilment of her engagement; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly."

With regard to the question whether damages is not the more appropriate remedy, I have the uncontradicted evidence of the plaintiffs as to the difficulty of estimating the damages which they may suffer from the breach by the defendant of her contract. I think it is not inappropriate to refer to the fact that, in the contract between the parties, in clause 22, there is a formal admission by the defendant that her services, being "of a special, unique, extraordinary and intellectual character" gives them a particular value "the loss of which cannot be reasonably or adequately compensated in damages" and that a breach may "cost the producer great and irreparable injury and damage," and the artiste expressly agrees that the producer shall be entitled to the remedy of

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(1) 1 De G. M. & G. 604, 619.

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injunction. Of course, parties cannot contract themselves out of the law; but it assists, at all events, on the question of evidence as to the applicability of an injunction in the present case, to find the parties formally recognizing that in cases of this kind injunction is a more appropriate remedy than damages.

Furthermore, in the case of *Grimston* v. *Cuningham* (1), which was also a case in which a theatrical manager was attempting to enforce against an actor a negative stipulation against going elsewhere, Wills J. granted an injunction, and used the following language (2): "This is an agreement of a kind which is pre-eminently subject to the interference of the Court by injunction, for in cases of this nature it very often happens that the injury suffered in consequence of the breach of the agreement would be out of all proportion to any pecuniary damages which could be proved or assessed by a jury. This circumstance affords a strong reason in favour of exercising the discretion of the Court by granting an injunction."

I think that that applies to the present case also, and that an injunction should be granted in regard to the specified services.

Then comes the question as to the period for which the injunction should operate. The period of the contract, now that the plaintiffs have undertaken not as from October 16, 1936, to exercise the rights of suspension conferred upon them by clause 23 thereof, will, if they exercise their options to prolong it, extend to about May, 1942. As I read the judgment of the Court of Appeal in *Robinson* v. *Heuer* (3) the Court should make the period such as to give reasonable protection and no more to the plaintiffs against the ill effects to them of the defendant's breach of contract. The evidence as to that was perhaps necessarily somewhat vague. The main difficulty that the plaintiffs apprehend is that the defendant might appear in other films whilst the films already made by them and not yet shown are in the market for sale or hire and thus depreciate their value. I think that if the injunction is in force during the continuance of the contract or for three years from now, whichever period is the shorter, that will substantially meet the case.

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(1) [1894] 1 Q. B. 125.

(2) Ibid. 130.

(3) [198] 2 Ch. 451.

The other matter is as to the area within which the injunction is to operate. The contract is not an English contract and the parties are not British subjects. In my opinion all that properly concerns this Court is to prevent the defendant from committing the prohibited acts within the jurisdiction of this Court, and the injunction will be limited accordingly.

Solicitors for plaintiffs: *Denton, Hall & Burgin.*
Solicitors for defendant: *Munton, Morris, King & Co.*

W. L. L. B.

THE KING *v.* FRANK SHERIDAN.

C. C. A.

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June 15; 29.

Criminal law—Practice—Plea—Autrefois convict—Conviction at petty sessions but no sentence pronounced—Committal for trial at quarter sessions on same charge—Conviction and sentence at quarter sessions —Validity of conviction at quarter sessions—" Conviction "—Duty of justices to inquire into character of defendant before convicting— Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 24, *sub-ss.* 1, 2.

The defendant was charged at petty sessions with an indictable offence and consented to be dealt with summarily. That court, after hearing the evidence on both sides, announced that it found the defendant guilty. Certain previous convictions of the defendant were then proved, whereupon the court, without passing sentence upon him, committed him for trial at quarter sessions. At the trial the defendant raised a plea of autrefois convict, but the court of quarter sessions overruled it and convicted him:—

Held, by the Court of Criminal Appeal, that there had been a conviction of the defendant at petty sessions; that in order to support the plea of autrefois convict it was not necessary that the conviction should have been followed by sentence, and that the quarter sessions should have accepted that plea; and that the conviction of the defendant by the latter court should be quashed.

Reg. v. *Blaby* [1894] 2 Q. B. 170 and *Reg.* v. *Miles* (1890) 24 Q. B. D. 423, held applicable.

Rex v. *Hertfordshire Justices* [1911] 1 K. B. 612, 622, dictum of Pickford J. followed.

Under the Criminal Justice Act, 1925, s. 24, sub-s. 1, justices are required, as a preliminary to any decision as to dealing summarily with an indictable offence, to take into consideration the character and antecedents of the accused.

Rex v. *Hertfordshire Justices* [1911] 1 K. B. 612, 624, observations of Avory J. referred to.

APPEAL from Southend-on-Sea Quarter Sessions.

The appellant was charged at the Southend-on-Sea Petty Sessions that on August 14, 1935, in incurring a debt to pay Lilian Emily Reid Patten, a lodging-house keeper, the sum of 24*s.* he obtained credit from her to that amount under false pretences or by means of fraud other than false pretences contrary to s. 13 of the Debtors Act, 1869.

The appellant consented to be dealt with summarily, and pleaded not guilty, and evidence was given for the prosecution and by the appellant on his own behalf.

The justices, after hearing the evidence, announced that they found the appellant guilty.

In order to assist the court in determining the proper sentence to be pronounced, certain previous convictions against the appellant were then proved, whereupon the justices announced that they would not deal with the case but would commit the appellant for trial at the above mentioned quarter sessions, and they remanded him for a week.

During the remand the appellant was charged before the justices with another offence—namely, that on August 28, 1935, at Southend-on-Sea he obtained goods from a Mrs. Dorothea Margaret Tredgett by false pretences with intend to defraud, the false pretence alleged being that he was then the authorized representative of Messrs. Wills, a firm of tobacconists, and that he was authorized by that firm to accept certain cigarettes and pipes and give credit for them.

The justices committed the appellant for trial at the above mentioned quarter sessions on both charges.

On April 24, 1936, the appellant was tried at the said quarter sessions before the Recorder and a jury on an indictment containing two counts, the first of which charged him with the said offence of obtaining goods from Mrs. Tredgett by false pretences, and the second of which charged him with the said offence of obtaining credit from Mrs. Patten under false pretences or by means of fraud other than false pretences contrary to s. 13 of the Debtors Act, 1869. The Recorder overruled a plea on behalf of the appellant of autrefois convict on the second count of the indictment. Evidence was then heard on behalf of the prosecution and the appellant. The Recorder thereupon summed up the case to the jury. The summing-up on the first count included certain directions, which are set out below in the judgment of the Court of Criminal Appeal, to the effect that the jury must be satisfied that the alleged representations were made by the appellant to Mrs. Tredgett, but it did not include an express direction that intent to defraud must be proved. The appellant was convicted on both counts and was sentenced to nine months' imprisonment.

The appellant appealed to the Court of Criminal Appeal by leave of that Court.

On June 15, 1936, that appeal was heard.

J. E. M. Gunning for the defendant, appellant. As to the offence charged in the second count of the indictment, namely that of obtaining credit under false pretences or by means of fraud, the conviction of the appellant at quarter sessions for that offence was wrong and should be set aside. That offence is one of those specified in the Second Schedule to the Criminal Justice Act, 1925, and, therefore, when the appellant was charged with that offence at petty sessions, being a court of summary jurisdiction, the case became subject to s. 24, sub-s. 1, of that Act (1), and on the appellant consenting to be dealt with summarily, the procedure there prescribed ought to have been followed. It is submitted that the true view of that procedure is that the petty sessions, having regard to the several matters there specifically mentioned, including the character and antecedents of the accused, and all the other circumstances of the case, and hearing the evidence as to all these matters, must then adopt one or other of two alternative courses, the one being to deal summarily with the offence, so that the accused may be acquitted or convicted by that court, and the other being to commit the accused for trial by a higher court; and that the petty sessions may up to the last possible moment reserve its decision as to which of these courses it will adopt, but when it has in fact adopted one of them it cannot afterwards change its mind and resort to the other. That that is the true meaning of that provision would seem to be shown by the observations of Avory J. in *Rex* v. *Hertfordshire Justices* (1) on the corresponding provision previously in force, but now repealed—namely, s. 12 of the Summary Jurisdiction Act, 1879. In the present case the justices at petty sessions, after having heard the evidence, announced that they found the appellant guilty of the offence which was afterwards charged against him in the second count of the indictment, and they thus convicted the appellant of that offence, and having done so they had no longer jurisdiction to commit him to quarter sessions to be tried for the same offence by that court as a court of first instance. Further, the petty sessions having convicted the appellant of that offence, the quarter sessions, as a court of first instance, had no jurisdiction to entertain the charge against him of having committed that offence, and the Recorder should have declined to do so, and should have accepted the appellant's plea of autrefois convict.

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(1) The Criminal Justice Act, 1925 provides :—Sect. 24: "(1.) Where a person who is an adult is charged before a court of summary jurisdiction with an indictable offence, being one of the offences specified in the Second Schedule to this Act, the court, if it thinks it expedient so to do, having regard to any representation made in presence of the accused by or on behalf of the prosecutor, the character and antecedents of the accused, the nature of the offence, the absence of circumstances which would render the offence one of a grave or serious character and all the other circumstances of the case . . . . and if the accused, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily, may, subject to the provisions of this section, deal summarily with the offence, . . ."

Eustace Fulton for the prosecution. The conviction of the appellant at quarter sessions for the offence charged in the second count of the indictment, namely that of obtaining credit under false pretences, was right. There had not previously been any valid conviction of the appellant for that offence at petty sessions or elsewhere. When the appellant was charged with that offence at petty sessions, the case came under the Criminal Justice Act, 1925, s. 24, sub-s. 1. That sub-section provides that if the accused consents to be dealt with summarily, as he did here, the court, having regard to the matters there particularly mentioned, including the character and antecedents of the accused and all the other circumstances of the case, may deal summarily with the offence. In this case the court of petty sessions disregarded that procedure, inasmuch as it declared the appellant guilty before it had heard evidence as to his character and antecedents; and on that ground his ostensible conviction by that court was irregular and of no effect. It is true that certain observations of Avory J. in *Rex* v.

(1) [1911] 1 K. B. 612, 624.

Hertfordshire Justices (1) might seem to mean that the justices cannot properly inquire into the character and antecedents of the person charged until they have determined to convict him; but these observations were only dicta which formed no part of the decision in that case, and further the procedure there dealt with was not under the sub-section just referred to but under a provision which differed from it in some respects and is now repealed.

Further, the announcement by the court of petty sessions that it found the appellant guilty did not amount to a conviction because it was not followed by sentence. A conviction involves both a confession or verdict of guilty and a sentence, which are one in law. It has been said that at common law in strictness a conviction consists of verdict, judgment and sentence: *Burgess* v. *Boetefeur* (2); see Archbold's Criminal Pleading, 29th ed., p. 228. For these reasons there was no conviction of the appellant by the court of petty sessions. The court of quarter sessions, therefore, rightly disregarded the appellant's plea of autrefois convict, and his conviction by that court was valid and should be upheld.

The Court (LORD HEWART C.J., HUMPHREYS and HILBERY JJ.) allowed the appeal, quashed the convictions, discharged the appellant, and intimated that the reasons for that decision would be stated on a future day.

1936. June 29. HUMPHREYS J. The Lord Chief Justice has asked me to read the following judgment, which is the judgment of the whole Court, consisting of the Lord Chief Justice, Hilbery J., and myself.

The appellant in this case was convicted at the quarter sessions for the borough of Southend-on-Sea upon both counts of an indictment which charged him in the first count with obtaining goods from Dorothea Margaret Tredgett by false pretences with intent to defraud, and in the second count with obtaining credit to the amount of 24s. from Lilian

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(1) [1911] 1 K. B. 612.
(2) (1844) 7 Man. & G. 481; 8 Scott N. R. 194.

Emily Reid Patten under false pretences or by means of fraud other than false pretences, contrary to s. 13 of the Debtors Act, 1869. He appealed by leave of this Court against both convictions.

At the hearing of the appeal the Court allowed the appeal, quashed the convictions, and ordered the discharge of the appellant. We now proceed to state our reasons for that decision.

With regard to the first count, it is sufficient to say that the summing-up of the learned Recorder was inadequate and unsatisfactory in many respects, and in particular that there was no direction to the jury that intent to defraud was an essential part of the case to be proved by the prosecution. The false pretence laid was "that he (the appellant) was the authorized representative of Messrs. Wills, a firm of tobacconists, and that he was authorized by the said firm to accept certain cigarettes and pipes and give credit for them." The only direction in law which the jury received from the learned Recorder upon this count is to be found in two statements in different parts of the summing-up: "You have to be satisfied that these representations were made and that she believed them," and "If you are satisfied that those representations were made which would lead to fraud, then you must find the defendant is guilty." In the absence of any proper direction as to the necessity for the prosecution to prove an intent to defraud on the part of the accused, it is impossible to allow the conviction on that count to stand.

The objection raised to the conviction on the second count was of a different character. At the trial Mr. Gunning for the appellant raised a plea of autrefois convict which was overruled by the learned Recorder. It appears that the appellant was originally charged at the petty sessional court at Southend with one offence only—namely, that of obtaining credit from Mrs. Patten contrary to s. 13 of the Debtors Act, 1869. That offence being one of those specified in the Second Schedule to the Criminal Justice Act, 1925, the appellant was addressed by the court in the terms of s. 24, sub-s. 2, of that Act, and thereupon consented to be dealt with summarily.

He pleaded not guilty. Evidence was called for the police, who were the prosecutors, and the appellant gave evidence on his own behalf. At the close of the case the justices conferred, and then announced that they found the appellant guilty. In order to assist the court upon the question of sentence, the only matter remaining to be dealt with, a police officer then proved certain previous convictions against the appellant, whereupon the magistrates announced that they would not deal with the case, but would commit the appellant for trial at quarter sessions, and remanded him for a week. On the remand, the charge of obtaining goods by false pretences from Mrs. Tredgett was added, and the appellant was committed for trial upon both charges.

Upon those facts this would seem to be a plain case of autrefois convict. The accused was convicted at Southend Petty Sessions by a court of competent jurisdiction of precisely the same offence and upon precisely the same facts as were relied upon in support of the second count of the indictment.

Mr. Fulton has argued that there can be no conviction such as will support a plea of autrefois convict unless there is also a sentence. In our judgment that is not the law.

In the case of *Reg.* v. *Blaby* (1) the question to be decided was the meaning to be given to the word "conviction" in a statute which provided that certain consequences should ensue upon a conviction for a misdemeanour following upon a previous conviction for a similar offence.

It appeared from a certificate produced that the prisoner had been convicted on a previous occasion, but that no judgment had been pronounced. It was argued for the prisoner that conviction must include judgment or sentence, but a very strong Court for Consideration of Crown Cases Reserved held that the word "conviction" in such a connection merely referred to a plea of guilty by the accused, or the finding of a verdict of guilty by a jury, and Hawkins J. in delivering the judgment of the Court (2) observed that it was the intention of the legislature "that the finding of the jury that the accused was guilty should be treated as a conviction;

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(1) [1894] 2 Q. B. 170.

(2) Ibid. 172.

'convicted' meant 'found guilty' and the sentence was to follow on the conviction." That decision is in our judgment in point in this case, as are the judgments to the same effect in the case of *Reg.* v. *Miles* (1), and in particular the judgment of Charles J. in that case.

Our attention has been directed to the case of *Rex* v. *Hertfordshire Justices.* (2) In that case, a defendant charged with an indictable offence having consented to the case being dealt with summarily, it appeared to the justices at the close of the evidence that the case had assumed such a serious aspect by reason of a conflict of evidence as to an alibi that it would not be right for them to deal with it, and they accordingly committed the defendant for trial. It was held (inter alia) by a Divisional Court that the justices by embarking upon a summary trial of the charge were not thereby deprived of their right to commit the defendant for trial. We entertain no doubt at all that that case was rightly decided, but it is to be observed that there was in that case no adjudication upon the charge by the justices, and in the course of his judgment Pickford J. put the present case when he observed as follows (3): "Undoubtedly if the justices had proceeded to adjudicate on the case either by convicting or by acquitting the defendant, that would have afforded ground for a good plea to the indictment." In our opinion the present is a case where the justices have proceeded to adjudicate by convicting the defendant, and accordingly the plea of autrefois convict was established.

Some comment was made in the course of the argument upon the dicta of Avory J. in the *Hertfordshire Justices Case* (2) as to the right of justices to inquire into the character and antecedents of the person charged before deciding to convict. The language of s. 12 of the Summary Jurisdiction Act, 1879, the statute then in force, is somewhat different from that used in s. 24 of the Criminal Justice Act, 1925. A consideration of sub-s. 1 of the latter section makes it plain in our view that justices are now required as a preliminary to any decision as to dealing summarily with an indictable offence to hear and to take into consideration certain matters specified in the section, one of them being the character and antecedents of the accused, to enable them to decide whether they ought to deal with the case summarily. Such a course does not appear to involve any unfairness to the accused. Presumably if the character of the accused as stated to them appears to them to be bad, the justices will refuse to deal with the case summarily, will proceed to take depositions, and, if a prima facie case is proved, will commit the accused for trial; on the other hand, if the character given to the accused is a good one, no harm will be done by the justices having heard that fact stated early in the proceedings.

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(1) (1890) 24 Q. B. D. 423. (2) [1911] 1 K. B. 612.
(3) Ibid. 622.

Appeal allowed. Convictions quashed.

Solicitor for appellant: *The Registrar of the Court of Criminal Appeal.*

Solicitor for prosecution: *R. A. Shorter, Southend-on-Sea.*

J. R.

Discussed. Rex *v.* Clarke [1950] 1 K. B. 523

C. A.

1936

June 29, 30; *July* 30; *Oct.* 12.

LEDWITH *v.* ROBERTS.

False imprisonment—Arrest on suspicion without warrant—Suspected person or reputed thief loitering about in any highway or place adjacent thereto with intent to commit a felony—Idle and disorderly persons—Power of constable to arrest without warrant limited to persons already belonging to class of suspected persons or reputed thieves—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *ss.* 4, 6—*Prevention of Crimes Act,* 1871 (34 & 35 *Vict. c.* 112), *s.* 15—*Penal Servitude Act,* 1891 (54 & 55 *Vict. c.* 69), *s.* 7—*Municipal Corporations Act,* 1882 (45 & 46 *Vict. c.* 50), *s.* 193—*Liverpool Corporation Act,* 1921 (11 & 12 *Geo.* 5, *ch. lxxiv.*), *s.* 513.

The Vagrancy Act, 1824, by s. 4, as amended by s. 15 of the Prevention of Crimes Act, 1871, and s. 7 of the Penal Servitude Act, 1891, provided that " . . . . Every suspected person or reputed thief frequenting . . . . any street or any highway or any place adjacent to a street or highway, with intent to commit felony, and every suspected person or reputed thief loitering about or in any of the said places and with the said intent . . . . shall be deemed a rogue and vagabond."

Sect. 6 provided " that it shall be lawful for any person whatsoever to apprehend any person who shall be found offending against this Act. . . . ."

Liverpool Corporation Act, 1921, s. 513, provided: " It shall be lawful for any police constable and all such persons as he shall call to his assistance to arrest and detain without warrant . . . .

" (2.) Any loose idle or disorderly person whom he shall find disturbing the public peace or whom he shall have good cause to suspect of having committed or being about to commit any felony misdemeanour or breach of the peace or to instigate or abet any such breach;

" (3.) Any person whom he shall find between sunset and the hour of eight in the morning lying or loitering in any street yard or other place and not giving a satisfactory account of himself."

Two young men, one of whom on an evening in February, 1935, was inside a telephone kiosk in Liverpool for the purpose as he alleged of receiving a call, while the other was waiting outside, were arrested by two police constables and detained. They brought an action for false imprisonment against the two police constables. The police officers by their defence said that they had kept the plaintiffs under observation for a period of twenty-five minutes and that they upon the grounds set out in the particulars had reasonable and probable cause for suspecting that the plaintiffs had been attempting or were about to commit a felony—namely, to steal from the coin box at the kiosk—and that they accordingly arrested them. It was not alleged in the defence that the plaintiffs were suspected persons or that they were idle or disorderly persons. The judge held that the facts alleged in the defence, even if proved, would afford no defence in law to the action, and he accordingly entered judgment for the plaintiffs.

On an appeal by the defendants :—

Held, that the powers of a constable to arrest without warrant under the Vagrancy Act, 1824, were confined to arresting persons frequenting or loitering who came within the description "suspected persons" or "reputed thieves," and that such persons could only be apprehended without warrant if they already were at the time of the arrest, by reason of their previous conduct, suspected persons or reputed thieves, and as the defendants had not alleged in their defence that either of the plaintiffs was a "suspected" person at the time of his arrest they could not rely upon that Act; and that the Legislature did not intend to leave it to a constable to arrest without warrant any citizen whom he found loitering in a street merely because the constable on what he deemed to be reasonable grounds suspected that such person was loitering for the purpose of committing a crime; that in order to justify apprehension and detention under s. 513 of the Liverpool Corporation Act, 1921, it must be established that the person apprehended belonged to the class of loose, idle or disorderly persons; the power to apprehend did not arise where all that could be proved was that the constable honestly believed on reasonable grounds that the person apprehended was a loose, idle or disorderly person; that the defendants could not rely upon that section, as they had not alleged in their pleadings that either of the plaintiffs was a loose, idle or disorderly person.

APPEAL from a decision of the Presiding Judge of the Liverpool Court of Passage.

The two plaintiffs, Joseph Ledwith and Christopher Crothers, were young men under twenty-one years of age who sued by their next friends. Both of them were window-cleaners.

The defendants, J. R. Roberts and H. A. Pearce, were both constables in the Liverpool City Police Force.

The plaintiffs by their statement of claim alleged that on February 28, 1935, the defendants maliciously and without reasonable or probable cause arrested and imprisoned them. The plaintiffs gave the following particulars: At about 7.15 in the evening of the said February 28, 1935, the plaintiff Crothers entered a telephone kiosk in King Street, Liverpool, to receive a call and the plaintiff Ledwith stood waiting outside. The defendants came to the said kiosk and wrongfully imprisoned and detained both plaintiffs for about ten minutes while they interrogated the plaintiffs and while a third constable made a telephone call in the said kiosk. The plaintiffs at once explained that the plaintiff Crothers was receiving a call. One of the defendants then took hold of the plaintiff Crothers and both defendants escorted both plaintiffs through the streets to the Heald Street Bridewell. At the said Bridewell the plaintiff Crothers was accused of tampering with the box in the said kiosk, and both plaintiffs were wrongfully imprisoned and detained for about three-quarters of an hour. At the end of that time the plaintiffs were informed that the truth of their explanation in regard to the telephone call had been established but that the charge of tampering with the box still remained. Thereupon both plaintiffs were wrongfully imprisoned and detained for a further two hours and were allowed to leave the said Bridewell at about 10.30 P.M., when they were told that they would probably be summoned. Neither of the plaintiffs had been summoned. The plaintiffs alleged that by reason of the premises they had suffered severe humiliation and discomfort, and they claimed damages from the defendants.

The defendants by their defence denied that the plaintiffs were wrongfully arrested or imprisoned by the defendants, and they said in para. 2 that the plaintiffs were for a period of twenty-five minutes kept under observation by the defendants and that the defendants, having as a result of such observation and upon grounds set out in the particulars to the defence reasonable and probable cause for suspecting that the plaintiffs had been attempting or were about to commit a felony, namely, to steal from the coin box at the said telephone kiosk, the defendants, as was their duty, arrested the plaintiffs and escorted them to Heald Street Bridewell, where they were detained by the officer there in charge until the completion of the inquiries which in the circumstances it became necessary for the police to make.

PARTICULARS.

(1.) The plaintiff Crothers was seen standing in the said telephone kiosk, in which there was no light. He was not telephoning and the plaintiff Ledwith was seen loitering outside apparently keeping watch and screening the plaintiff Crothers in the said kiosk from passers-by.

(2.) The plaintiff Crothers remained inside the said kiosk for a period of about twenty-five minutes, during which time, although he handled the receiver, he did not make use of the telephone.

(3.) From time to time during the said 25 minutes the plaintiff Crothers was seen to bend down and apparently examine the coin container in the said kiosk.

(4.) During the whole of the said twenty-five minutes the plaintiff Ledwith remained outside the said kiosk in the manner hereinbefore indicated.

(5.) At the end of the said twenty-five minutes the defendants approached the said kiosk, whereupon the plaintiff Ledwith kicked the door of the same and shouted and the plaintiff Crothers at the same time picked up the telephone receiver.

(6.) The plaintiff Ledwith in answer to questions by the defendants as to what the man inside had been doing during the previous twenty-five minutes and as to whom he was then talking to said he did not know, and on being asked if he had been keeping a look-out outside the kiosk he did not reply.

(7.) The plaintiff Crothers stated that he had been speaking to his mate on the telephone, but on being asked by the defendants who his mate was and from where his mate had been speaking he said he did not know.

(8.) The telephone operator and supervisor on an inquiry then and there made over the telephone by the defendant Pearce stated that no calls had been received to or from the said kiosk within the previous half-hour.

(9.) The plaintiffs were again asked by the defendants to explain what they had been doing during the previous twenty-five minutes but neither gave any reply.

There was no allegation in the defence that either of the plaintiffs was a suspected person or that he was an idle or disorderly person.

At the hearing before the judge of the Liverpool Court of Passage, the judge was asked to amend the defence by adding a statement that the plaintiffs were idle persons, but he refused.

No evidence was called, but it was stated by counsel for the two defendants that he could not prove any facts beyond those stated in the defence and the particulars thereto, and that he relied upon the facts pleaded as constituting both the plaintiffs as suspected, idle and disorderly persons.

The Presiding Judge intimated that in his opinion the facts alleged in the defence, even if proved, would afford no defence in law to the action. The counsel for the plaintiffs then said that he was satisfied with the view expressed by the judge and did not wish to call any evidence. The case was therefore decided upon the basis that the allegations in the defence were assumed to be true, and upon that assumption the judge decided that they disclosed no defence in law.

The Presiding Judge gave judgment for each of the plaintiffs for 15*l.*

The defendants appealed.

Maxwell Fyfe K.C. and *C. C. Trotter* for the appellants. The facts set out in para. 2 of the defence and the particulars annexed thereto amount to a sufficient justification in law for the apprehension and detention of the two plaintiffs by the two police officers, who were entitled by reason of the Vagrancy Act, 1824, ss. 4 and 6, the Municipal Corporations Act, 1882, s. 193, and the Liverpool Corporation Act, 1921, s. 513, to arrest the two plaintiffs without a warrant upon suspicion that they intended to commit a felony. Sect. 6 of the Vagrancy Act, 1824, authorizes any person to apprehend without warrant any person found offending against the Act. Sect. 4 provided that a person committing any of the offences therein mentioned should be deemed a rogue and vagabond and punished as such. Among the offences set out in that section as amended by s. 15 of the Prevention of Crimes Act, 1871, and s. 7 of the Penal Servitude Act, 1891, was the following: "Every suspected person or reputed thief frequenting . . . . any street or any highway or any place adjacent to a street or highway, with intent to commit felony, and every suspected person or reputed thief loitering about or in any of the said places and with the said intent . . . .

shall be deemed a rogue and vagabond." The allegation that the two police officers suspected on reasonable grounds that the two plaintiffs were about to commit a felony was a sufficient allegation that the plaintiffs were "suspected persons" within the meaning of the statute: see *Hartley* v. *Ellnor*. (1) The test whether a person is a suspected person is the honest belief of the police officer based upon reasonable grounds. The fact that a court of summary jurisdiction dismisses a case does not prevent the arrest of a person by a police officer on suspicion being justified: see *Trebeck* v. *Croudace* (2), which is an authority in favour of the defendants binding upon the Court in the present case. In that case Bankes L.J. said (3): "in my opinion, the character of the various offences enumerated in the section [s. 12 of the Licensing Act, 1872] sufficiently indicates that the Legislature, in allowing and encouraging prompt action in the public interest, did not intend to require a higher justification for an arrest than honest belief on reasonable grounds on the part of the person making the arrest." That case was followed by a Divisional Court in *Isaacs* v. *Keech*. (4) Bankes L.J. there said (5): "I think, however, that the whole trend of authority has been to put a uniform construction upon enactments giving power to arrest without a warrant a person found committing an offence, and to hold that what the Legislature has in mind is not a mere power to arrest the person ultimately found guilty of the offence, but is a power to be exercised by the proper authority of acting at once on an honest and reasonable belief that the person is committing the particular offence." That dictum is directly in point in the present case. In order to justify the arrest under s. 4 of the Vagrancy Act, 1824, three things must be proved: (1.) that the persons arrested were suspected persons; (2.) that they were loitering; (3.) that they were doing so with intent to commit a felony. It is sufficient if the police officer can say that he had reasonable grounds for suspecting that the person arrested was loitering with intent to commit a felony. The term "reputed thief" refers to a person with a past history. A police officer can arrest a person without a warrant who is loitering with intent to commit a felony if on that person's past history he is a reputed thief or if he is suspected by the police officer on reasonable grounds of an intent to commit a felony. The section does not say that the suspicion must be due to the person's conduct in the past. The intention of the Legislature in passing the Act was to enable a police officer to arrest if he has reasonable grounds for suspecting the person arrested of an intention to commit a felony. The Municipal Corporations Act, 1882, gives power by s. 193 to a constable to apprehend any idle and disorderly person whom the constable has just cause to suspect of intention to commit a felony, and the Liverpool Corporation Act by s. 513 empowers a police constable to arrest without warrant any loose idle or disorderly person whom he shall have good cause to suspect of having committed or being about to commit any felony or misdemeanour, or any person whom he shall find at night loitering in any street and not giving a satisfactory account of himself. It is true that it was not alleged in the defence that the two plaintiffs were idle and disorderly persons, but the particulars set out in the defence amount to an allegation that they were idle at the time they were under observation, and those Acts justified the arrest of the two plaintiffs without a warrant.

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(1) (1917) 117 L. T. 304.
(2) [1918] 1 K. B. 158.
(3) [1918] 1 K. B. 168.
(4) [1925] 2 K. B. 354.
(5) Ibid. 360.

Goldie K.C. and *Basil Nield* for the respondents. The decision of the Presiding Judge of the Liverpool Court of Passage that the facts set out in the defence, even if proved, would not afford a defence in law to the action was correct. The law as to arrest on suspicion of felony is thus stated in Salmond on Torts, 9th ed., p. 377: "It is the right, and indeed the duty of every private citizen to arrest without warrant . . . . any person whom he suspects upon reasonable and probable grounds of having committed a felony. The question of reasonable and probable cause is . . . . a question for the judge and not for the jury. There is a curious distinction between arrest by a private person and arrest by a constable.

. . . . In the case of arrest by a constable, on the other hand, it is sufficient if there was reasonable and probable cause of suspicion, even if no felony has been in fact committed . . . . it is not necessary for liability that the arrest should have been malicious; it is enough that it was without reasonable and probable cause. The burden of proving the existence of reasonable and probable cause is on the defendant. There is no authority at common law for arresting without warrant on suspicion of a misdemeanour, but by numerous statutory provisions power to effect such arrests is given in particular instances." A defendant is bound to raise by his defence all matters which show that the action is not maintainable, and all such grounds of defence as if not raised would be likely to take the opposite party by surprise: see Order XIX., r. 15, the rule applying to the Liverpool Court of Passage being similar. The application of the defendants to amend the defence by adding the word "idle" was therefore properly refused by the judge. The Act of 2 & 3 Vict. ch. xciv. (1839) "for regulating the police in the City of London" was similar in its terms to the Liverpool Corporation Act of 1921. Sect. 18 of the Act of 1839 empowered "any man belonging to the said police force to take into custody without warrant all loose, idle and disorderly persons . . . . whom he shall have good cause to suspect of having committed or intending to commit any felony, misdemeanour or breach of the peace, and all persons whom he shall find between sunset and the hour of eight in the forenoon lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves." It was held in *Bowditch* v. *Balchin* (1) that a police constable of the City of London has no power under that Act to take a person into custody, without warrant, merely on suspicion that he had committed a misdemeanour; and further unless the person arrested fell within the class of "loose, idle and disorderly persons." In order that a person shall come under s. 4 of the Vagrancy Act, 1824, he must be a suspected person or a reputed thief; he must be loitering ; and he must have an intent to commit a felony. A person who committed any of the offences specified in s. 3 of the Vagrancy Act, 1824, became an idle and disorderly person. Sect. 4 turned a person who committed certain offences specified therein from an idle and disorderly person into a rogue and vagabond, and made it possible to punish such person more severely as a rogue and vagabond, but it did not make it possible to arrest such person without a warrant under s. 6. A person against whom nothing is known cannot come within the category of " suspected person or reputed thief." It is not alleged in the defence that either of the two plaintiffs was a " suspected person." There is no right at common law to arrest for misdemeanour without a warrant. Sect. 104 of the Larceny Act, 1861, which was unrepealed by the Larceny Act, 1916, empowered any police officer to " take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act." If the contention of the other side is correct with regard to the provisions of the Vagrancy Act, 1824, there was no necessity for passing s. 104 of the Act of 1861. Under s. 104 there was no necessity for the person arrested to be a suspected person, it was sufficient if the police officer had good cause to suspect. That section was passed in an attempt to tighten up the law. Under the Vagrancy Act, 1824, it is not enough for a police officer to suspect a person of an intention to commit a felony in order to arrest him without warrant. The person arrested must belong to a class of suspected persons from his reputed conduct, or at any rate he must—as in *Hartley* v. *Ellnor* (1)—have committed a series of acts while under observation by the police which are sufficient to put him into the class of suspected persons. The Municipal Corporations Act, 1882, s. 193, shows that Parliament was endeavouring to protect the liberty of the subject by only allowing arrest without warrant under that section of a person whom the constable

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(1) (1850) 5 Ex. 378.

(1) 117 L. T. 304.

has just cause to suspect of an intention to commit a felony. In the present case there was no evidence of an intention to commit a felony, there was only an attempt to commit a felony by attempting to tamper with the coin box. The right of a police officer under s. 513, sub-s. 2, of the Liverpool Corporation Act, 1921, was limited to arresting loose idle or disorderly persons. It was not alleged that the plaintiffs came within that class, and as the judge was not prepared to say that they came within that class and would not allow the pleadings to be amended to allege that they did so come, the appellants' contention based on that Act fails. The power given by sub-s. 3 was of arresting any person loitering in any street at night and not giving a satisfactory account of himself. There was no evidence of loitering in the present case. The judge accepted the allegation that the plaintiffs went to the telephone box for a proper purpose.

[SCOTT L.J. referred to the *Cambridge Spinning House Case* (*Kemp* v. *Neville.* (1))]

Kemp v. *Neville* (1) was an action against the Vice-Chancellor of Cambridge University, who had in his judicial capacity committed a young woman to the house of confinement known as the Spinning House. In an action by the young woman against the Vice-Chancellor for false imprisonment it was held he was not liable as a judicial officer to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction. In *Hartley* v. *Ellnor* (2) the man was kept under observation by the police for a period of forty minutes, during which time he was seen on seven separate occasions in different parts of the city of Birmingham to attempt to pick the pockets of passengers on tramcars. It is quite clear that on the facts of that case the police had good cause for thinking that he was a suspected person. At common law a person cannot be arrested without a warrant for a misdemeanour, but there are numerous statutes under which police officers are empowered to arrest in particular instances upon reasonable suspicion. *Trebeck* v. *Croudace* (3)

(1) (1861) 10 C. B. (N. S.) 523.

(2) 117 L. T. 304.

(3) [1918] 1 K. B. 158.

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is merely an example of such an instance, and it is not an authority for a general proposition to that effect. That was not a case where the offence charged was limited to a particular class of suspected persons, but was that of being drunk while in charge of a vehicle on the highway. In that case the police officer was given power to arrest if he honestly and on reasonable grounds believed the person to be committing the offence at the time he was arrested.

Maxwell Fyfe K.C. replied.

Cur. adv. vult.

1936. July 30. The Court (Greer, Greene and Scott L.JJ.) dismissed the appeal, stating that they would give the reasons for their decision on a subsequent date.

Oct. 12. Greer L.J. In this case we have already given judgment dismissing the appeal, but, for reasons connected with the business of the Court, we adjourned giving our reasons until to-day.

The following judgments were then read:—

Greer L.J. This is an appeal from a judgment of the Presiding Judge of the Liverpool Court of Passage in favour of the two plaintiffs awarding them each 15*l*. damages for false imprisonment. The hearing of the case took a somewhat unusual form. No evidence was called, but it was admitted by the counsel for the two defendants, who were Liverpool police constables, that if he was called upon to give evidence in support of the defence which had been pleaded he could not prove any facts beyond those stated in the defence and the particulars thereto. We were told by both counsel who appeared before us that the point was put to and decided by the judge as a preliminary question, and it was suggested that in any event, whether we agreed with the learned judge's decision or not, there should be an order for a new trial, and that we ought not to affirm the judgment. In my view this involves a misunderstanding of what took place at the hearing. It seems to me clear that both counsel were content that the judge should decide the question whether on the pleadings the plaintiffs were entitled to a judgment. No doubt in the first instance the point was referred to as a preliminary question, but towards the end of the argument Mr. Shawcross, for the defendants, said: "So far as I am concerned, my evidence would establish at the highest what I have pleaded—no more—and I rely on what I have pleaded as constituting these plaintiffs both suspected and idle, and, indeed, disorderly persons." (See p. 22 of the Shorthand Note.) On p. 23 the learned judge said: "I should not be prepared to hold that they (that is, the two plaintiffs) were lying in the street or loitering in the sense of the statute," and Mr. Shawcross said: "If your Lordship pleases." The judge then turned to the counsel for the plaintiffs and said: "Are you satisfied with that, or do you want to give any evidence?" and Mr. Nield, who appeared for the plaintiffs, said: "I think I should be satisfied with that, my Lord." After a little further discussion, on p. 24 the judge said, addressing Mr. Shawcross: "Very well. Thank you, Mr. Shawcross. That will be judgment for these two plaintiffs for 15*l.* each, with costs." The amount of the damages had been agreed at that sum. Then the judgment as drawn up by the Registrar of the Court was a judgment to the effect that each of the plaintiffs recover against the defendants 15*l.* Then there was a stay of execution.

It seems to me that if we agree with the view of the learned judge that the facts stated in the defence and particulars are insufficient to justify the imprisonment of the two plaintiffs, we ought to affirm the judgment and not order a new trial. The fact of the apprehension and detention of the two plaintiffs was not disputed, but the defendants contended that the facts that they pleaded in para. 2 of the defence and the particulars thereto amounted to a justification in law of the apprehension and detention of the two plaintiffs. In para. 2 it was alleged that the defendants had, as a result of their observation and upon the grounds thereinafter mentioned, that is, in the particulars, reasonable and probable cause for suspecting and each of them, in fact, suspected that the plaintiffs had been attempting or were about to commit a felony—namely, to steal from the coin box at a telephone kiosk the contents thereof. The particulars were as follows: [His Lordship read the particulars and continued:] It will be seen that the defendants nowhere stated that the plaintiffs were idle or disorderly persons, or that they had reasonable and probable cause for suspecting that they were idle and disorderly persons. The learned judge was asked to amend the defence by adding a statement that the plaintiffs were idle persons, but he refused, and, in my judgment, rightly refused, so to amend the defence.

The defendants' counsel argued that they had by statute a sufficient justification for the alleged false imprisonment, and the question to be determined is whether the facts stated in para. 2 of the defence and the particulars thereto justify the apprehension and detention of the two plaintiffs. The relevant statutory provisions that it is necessary to consider are s. 4 of the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 193 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), and s. 513 of the Liverpool Corporation Act, 1921.

The Vagrancy Act of 1824, s. 4, provides (inter alia) that "every suspected person or reputed thief frequenting any river, canal or navigable stream, dock or basin, or any quay, wharf or warehouse near or adjoining thereto, or any street, highway or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway or place adjacent, with intent to commit felony," apprehended by a constable or police officer and brought before a justice of the peace shall be deemed to be a rogue and vagabond and therefore punished as provided by the statute. The words of the section are not very clear, but I think they must be construed as meaning that every suspected person or reputed thief may be apprehended by a police officer without warrant and brought before a justice of the peace and convicted as a rogue and vagabond. By s. 7 of the Penal Servitude Act, 1891, this section of the Vagrancy Act was made applicable also to every suspected person or reputed thief loitering about or in any of the places mentioned in the Vagrancy

Act. The question for consideration, so far as these statutes are concerned, is whether the right of the police to apprehend or arrest is confined to persons who are within the description "suspected persons" or "reputed thieves." In my judgment, apart from the authorities, which I will deal with presently, the special powers given to constables are confined to a class of persons described as "suspected persons" or "reputed thieves." They can only be apprehended without warrant if they already are at the time of their arrest and imprisonment suspected persons or reputed thieves. I do not think this means that if the constable suspects the person whom he apprehends he is entitled to arrest and imprison him without warrant. The person so apprehended must be some person who has become suspect, that is to say, some person who belongs to the class of suspected persons by reason of his antecedent conduct. I think "suspected person" means a person who has acquired the character of a suspect and does not mean every person whom the apprehending constable suspects to be loitering with intent to commit a felony. It appears to me very difficult to think that the Legislature intended to leave it to a constable to arrest without a warrant any citizen whom he found loitering in a street if he, on what he deemed to be reasonable grounds, suspected that he was loitering for the purpose of committing a crime. In my judgment, the powers of a constable to arrest without warrant are confined to cases in which he finds frequenting or loitering, etc., a person who has, by his previous conduct, become a suspected person. Any other view would put a respectable person loitering in a street for a reasonable cause at the mercy of any constable who knew nothing about him except that he was loitering, and, therefore, chose to suspect him of loitering for the purpose of committing a felony or misdemeanour. I think the exceptional powers conferred on the police by the Vagrancy Act were so conferred with respect to a class of persons who were, apart from the particular occasion, within the description of suspected persons.

In the argument before us counsel for the defendants also relied upon s. 193 of the Municipal Corporations Act, 1882, as justifying the apprehension and imprisonment of the two plaintiffs; but I do not think the defence, in the absence of the amendment which was refused, enables the defendants to rely upon this section.

The chief argument on behalf of the defendants was based on s. 513 of the Liverpool Corporation Act, 1921, sub-ss. 2 and 3. That statute provides that it shall be lawful for any police constable to arrest and detain without warrant any loose idle or disorderly person whom he shall have good cause to suspect of having committed or being about to commit any felony misdemeanour or breach of the peace, and any person whom he shall find between sunset and the hour of eight in the morning lying or loitering in any street yard or other place and not giving a satisfactory account of himself. I think the learned judge was right in concluding that sub-s. 2 only gives authority to arrest without warrant loose idle or disorderly persons whom he shall have good cause to suspect of having committed or being about to commit any felony misdemeanour or breach of the peace. In order to justify apprehension and detention under that section, it must be established, first, that the person apprehended belongs to the class of loose idle or disorderly persons. The power to apprehend does not arise where all that can be proved is that the constable honestly believed on reasonable grounds that the person apprehended was a loose idle or disorderly person. The sub-section does not say that the power of apprehension without warrant arises in respect of any person whom the constable shall have good cause to suspect to be a loose idle or disorderly person, but if he finds a person of that description and has good cause to suspect that such person has been committing or was about to commit any felony or misdemeanour he may then arrest him without warrant. In any event, the defendants are disentitled to rely upon this sub-section on the ground that they had not alleged in their pleadings that either of the plaintiffs was a loose idle or disorderly person, and an amendment to enable them so to do was refused. Sub-s. 3 creates some difficulty, especially with regard to the apprehension of

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the plaintiff Ledwith, inasmuch as he was, in what may be considered in one sense of the word, loitering in a street; but I do not think when we are dealing with a criminal matter we ought to interpret the word "loitering" in the wide sense of standing or waiting in the street. I think it means loitering in such a way as to indicate that the person was idling in the street for some unlawful purpose. I think the particulars do indicate that Ledwith did not give a satisfactory account of himself, if the meaning of these general words be, that he did not give a satisfactory account of what he was doing, and why he was doing it. But there is, I think, another objection to allowing the defendants to rely upon sub-s. 3. Sect. 513 is contained in a private Act of Parliament which by its title gives no indication that it is an Act dealing with the authority of police constables. It seems to me that if the defendants desired to rest their defence on any part of s. 513 of this private Act of Parliament they ought to have given notice of it in their defence, either by using the exact words of the material parts of the section, or at least have pleaded that they relied on that section of the Liverpool Corporation Act, 1921.

It remains for me to deal with the authorities. In *Bowditch* v. *Balchin* (1) the Court of Exchequer had to decide whether a plea based on a section of 2 & 3 Vict. ch. xciv., which was "an Act for regulating the police in the City of London," was bad because it had not therein been alleged that the plaintiff was a loose, idle and disorderly person. By that section power was given to any man belonging to the police force to "take into custody without warrant all loose, idle and disorderly persons whom he shall find disturbing the public peace or whom he shall have good cause to suspect of having committed or intending to commit any felony, misdemeanour or breach of the peace, and all persons whom he shall find between sunset and the hour of eight in the forenoon lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves." The plea contained no averment that the plaintiff was a loose, idle

(1) 5 Ex. 378.

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and disorderly person. The Court held that the plea was bad in that it contained no averment that the plaintiff was a loose, idle and disorderly person. The decision of the Court involves a decision that it is not sufficient to justify the apprehension of the plaintiff if the police officer had good cause to suspect and did suspect the plaintiff of having committed the offence with which he was charged. The case is very shortly reported, and does not help us to solve the question whether it would have been sufficient to justify the apprehension of the plaintiff if the police believed on reasonable grounds that the plaintiff was a loose, idle and disorderly person. It only decides that the police could not claim the protection of the 18th section of the Act unless they pleaded and proved that the person was not only suspected for good cause of having committed or intending to commit a felony or misdemeanour, but also that he came within the description of "a loose, idle and disorderly person." It does not seem to me that this case is very helpful, though it appears to support the reasons above stated with regard to the effect of the Vagrancy Act.

The next case cited in the argument was the case of *Hartley* v. *Ellnor*. (1) This case was concerned with a charge before the magistrates made under the Vagrancy Act, 1824, as amended by the Prevention of Crimes Act, 1871. The facts and the decision of the justices are stated in the second paragraph of the headnote as follows: "E. was kept under observation by the police in a certain part of the City of B." (that is Birmingham) "on a certain day for a period of about forty minutes. During that time he was seen to mix with various crowds of people who were in the act of boarding tramcars, and he was noticed to tap the pockets of various individuals in the crowds. He was then arrested by the police as a suspected person and charged before the justices of B. with being a rogue and vagabond within the meaning of s. 4 of the Vagrancy Act, 1824. There was no evidence of any previous offence against E. The justices were of opinion that, by reason of s. 15 of the Prevention of Crimes

(1) 117 L. T. 304.

Act, 1871, E. could not be convicted as a rogue and vagabond on a charge of frequenting a public place for the purpose of committing a felony without it being shown that he had been previously convicted, or that he was a suspected person or a reputed thief, or that he was a person of known bad character prior to the date on which the act or acts took place on account of which he was arrested as a suspected person, and dismissed the charge." It was held by a Divisional Court consisting of Lord Reading C.J., Ridley and Avory JJ. that the justices were wrong. It is to be observed that the case does not directly raise the question whether the police were entitled to take the respondent into custody without a warrant. It only deals with the question whether the justices were right in refusing to convict on the ground that it had not been shown that the respondent had been previously convicted, or that he was a suspected person or reputed thief; but I think the case necessarily involves a decision of the question whether the appellant was entitled to arrest the respondent without a warrant, because his power to do so depends upon the same considerations as those which affect the correctness or otherwise of the decision of the justices. In stating the question Avory J. said (1): "The only question which we are called upon to decide is whether they"—that is, the justices—"were right in coming to the conclusion that there must be evidence of a previous conviction or of previous bad character in order to render an individual a suspected person within the meaning of the section of the statute under which these proceedings were taken." The learned judge goes on to say: "A person may be a suspected person even though he is not a reputed thief, and a person may be a suspected person on a particular day, even though he has not been previously convicted, or even though he has not had a reputation for bad character in the past. When one examines the facts of the present case there can be no doubt whatever that the respondent was a suspected person on the day in question. For a period of about forty minutes he had been kept under observation by police officers, and during the

(1) 117 L. T. 305.

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whole of that time he was engaged on and off in doing acts which, to say the least, gave rise to a reasonable suspicion that he was attempting to pick the pockets of various passengers who were boarding tramcars. He was seen to be acting in a suspicious manner on no less than seven separate occasions in different parts of the City of Birmingham during the forty minutes that he was being watched by the police." The Court then came to the conclusion that when he was arrested the respondent was a suspected person. It seems to me obvious that the justices were wrong in refusing to regard him as a suspected person when he was arrested, inasmuch as he had been acting in a manner which would have satisfied anybody that he was a person whom it was reasonable to suspect. In my view this decision was plainly right, because the evidence showed that at the time of the arrest he had brought himself within the description of a suspected person, that is to say, a person who had been acting in such a way as to make it proper to describe him as a suspected person, meaning thereby a person who had by his acts shown that he was a person of whom it was right to say he had been acting in a manner which raised a suspicion that he was acting in furtherance of an unlawful and criminal purpose. It does not seem to me that this decision assists the appellants in the present appeal.

Nor do I think that the decision of the Court of Appeal in *Trebeck* v. *Croudace* (1) establishes any proposition of law which is inconsistent with the decision of the Presiding Judge in the present case. In that case the plaintiff had been apprehended without warrant as a person charged with "being drunk while in charge on a highway of a carriage." His being drunk while in charge of a carriage was the essence of the charge against him. The Court held that the power to apprehend conferred by the section authorized the apprehension of persons who honestly and upon reasonable grounds were believed to be committing the offence at the time when they were arrested, and that it was not necessary to prove, in order to justify the apprehension of the plaintiff, that he

(1) [1918] 1 K. B. 158.

was in fact drunk. The decision was a decision under the Licensing Act, 1872, and, in my judgment, it does not compel us to hold that the statutes to which I have referred mean that the police have power to apprehend any person whom they suspect to be a suspected person or reputed thief, or whom they suspect to be an idle or disorderly person.

The other case relied on by Mr. Maxwell Fyfe for the appellants is a decision of a Divisional Court consisting of Bankes and Scrutton L.JJ.—*Isaacs* v. *Keech* (1)—on the question whether under s. 28 of the Town Police Clauses Act, 1847, a police officer who honestly believed that the plaintiff was a common prostitute or night-walker loitering and importuning passengers for the purpose of prostitution was justified in apprehending her without warrant. In this case it was an essential part of the offence that the importuning of passengers should be an importuning by a common prostitute or night-walker, and the question and the decision thereon seem to me exactly similar to the decision of the Court of Appeal in *Trebeck* v. *Croudace* (2), which decision the Divisional Court were bound to follow.

As above indicated, I think that under the Vagrancy Act, 1824, in order to justify an arrest without warrant the authority to apprehend is confined to persons who come within the description stated in the relevant section of the statute. The power of arrest is confined to persons of that class, though I think it follows from the decisions that once it is established that the person arrested belonged to the class of persons with respect to whom the special power to arrest is given to the constables, then if the constable honestly and on reasonable grounds believes that the person apprehended has been committing or attempting to commit a felony or misdemeanour he has power to arrest even though it should be established later that the person arrested was not, in fact, attempting to commit a felony or misdemeanour. I do not think the statutes mean that any person whom a constable thinks has been acting in a suspicious manner may be arrested without warrant, or that any person whom he

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(1) [1925] 2 K. B. 354.

(2) [1918] 1 K. B. 158.

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suspects to be an idle or disorderly person can be so arrested. I think the power of a constable to arrest any person whom he honestly and reasonably suspects to have committed or be about to commit a felony or misdemeanour is confined to the class of persons who have been acting suspiciously, or have been behaving as idle or disorderly persons. To read these statutes as giving the police power to arrest without warrant any person whatsoever (though not belonging to the class of suspected persons or the class of idle or disorderly persons) would be holding that they had been given a power extremely dangerous to any well-behaved person who may have good reason for frequenting or loitering in the places mentioned in the statutes.

I agree with the judgment of the Presiding Judge, with the result that this appeal must be dismissed with costs.

GREENE L.J. The trial of this action proceeded in a rather unusual manner. In the course of the opening by the plaintiffs' counsel the learned Presiding Judge intimated a view that the facts alleged in the defence, even if proved, would afford no defence in law to the action. This view was not displaced by arguments addressed to him by the defendants' counsel. In this situation counsel for the plaintiffs, when asked by the learned judge whether he wished to call evidence, said that he was satisfied with the view expressed by the learned judge, and, accordingly, he called no evidence. The case, therefore, was decided upon the basis that the allegations in the defence were to be assumed to be true; and it was held upon this assumption that they disclosed no defence in law. The present appeal can only be dealt with on the same basis.

It is contended on behalf of the appellants that the facts alleged in the defence, assuming them to be true, bring the case within all or some or one of three statutory provisions which give a power to arrest without a warrant. I will deal with these three provisions in order.

The earliest is s. 6 of the Vagrancy Act, 1824 (5 Geo. 4, c. 83). That section gives power to any person to apprehend "any person who shall be found offending against this Act." The particular offence in respect of which it is contended that the respondents were found offending against the Act is one of a long list of offences set out in s. 4 of the Act, which provides that a person who commits any of those offences shall be deemed a "rogue and vagabond." This category is the second in order of the three categories of knavery which the Act defines—the first is "idle and disorderly person," the second is "rogue and vagabond," the third is "incorrigible rogue." The offence in question is described in the section as amended by s. 15 of the Prevention of Crimes Act, 1871, and s. 7 of the Penal Servitude Act, 1891, as follows—I omit words not relevant for the present purpose—"Every suspected person or reputed thief frequenting . . . . any street or any highway or any place adjacent to a street or highway, with intent to commit felony, and every suspected person or reputed thief loitering about or in any of the said places with the said intent." When the defence is examined in connection with this provision it is, I think, apparent that if it was intended to plead facts which would bring the case within it the language used has singularly failed to effect its intention. It is not alleged that either of the respondents was a "suspected person." All that is alleged is that, as a result of observing certain things described in the particulars and upon the grounds stated in the particulars, each of the appellants had reasonable and probable cause for suspecting and did, in fact, suspect that the respondents had been attempting or were about to commit a felony. I will deal with this point more fully later. Next, there is no allegation of "loitering"—an essential matter to allege and prove—except with regard to the respondent Ledwith, and in his case the allegation is qualified by the words "apparently keeping watch and screening the plaintiff Crothers." Neither this allegation nor the allegations with regard to Crothers' behaviour in the kiosk or the remaining allegations with regard to Ledwith's actions outside the kiosk are, in my judgment, sufficient allegations of "loitering" within the meaning of the statute. In a case of this kind, I consider it essential that the allegations upon which it is proposed to say that the arrest was justified by a statute should be made with clearness and precision so that the plaintiff may know the case which he has to meet. The third matter in respect of which there is a failure to allege facts essential to justify the arrest is the "intent to commit felony." There is no allegation of any such intent, merely an allegation that the appellants suspected on reasonable grounds that the respondents were about to commit a felony. This point also I will deal with presently. It is said that the allegation that the appellants suspected on reasonable grounds that the respondents were about to commit a felony is a sufficient allegation that they were "suspected persons"; and in support of this contention reliance is placed upon the decision of a Divisional Court in *Hartley* v. *Ellnor*. (1) I am unable to take this view. If correct, it would amount to this, that it is sufficient for a constable to suspect a person on reasonable grounds of being about to commit a felony to justify him in making an arrest. If the Legislature had so intended, nothing would have been easier than to say so. The statute does not say, "any person suspected of loitering with intent to commit felony"—it says, "any suspected person or reputed thief." The context, to my mind, makes it clear that the only persons who can commit this particular offence are persons who fall within one or other of these two classes. A man is not a reputed thief merely because a constable thinks he is a thief, and I cannot see how a man can be said to be a suspected person merely because a constable suspects him. The phrase "a suspected person" in this context, particularly when it is placed in juxtaposition to the words "reputed thief," is, in my judgment, apt to describe and to describe only a person who, quite apart from the particular occasion and antecedently thereto, has become the object of suspicion, just as a "reputed thief" is a person who already has the reputation of a thief. In the case of *Hartley* v. *Ellnor* (1) it was held that a person was a "suspected person" within the meaning of the statute on the ground that two police constables had seen him tap the pockets of various persons at different places during a period of forty minutes. With all respect, I cannot agree with the reasoning of the Court in that case upon this point. Avory J., who delivered the judgment of the Court, says (1), with reference to the argument that the person must previously have been the object of suspicion: "By whom must he have been suspected before the day in question?" Speaking for myself, I see no difficulty in answering this question any more than I do in answering the question: "By whom must he have been reputed to be a thief?" But, in any event, the facts in *Hartley* v. *Ellnor* (2) were very different from those in the present case, and I cannot regard it as an authority binding us to decide this case in favour of the appellants.

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(1) 117 L. T. 304.

With regard to "loitering with intent to commit felony," it is said that whereas, when a person is charged with the offence, it is essential to prove the intent (as to which see the Prevention of Crimes Act, 1871, s. 15), yet the power of arrest extends to cases where the person making the arrest on reasonable grounds believes that the person whom he arrests, (*a*) is loitering, (*b*) is doing so with intent to commit felony. In other words, s. 6 of the Vagrancy Act is to be construed as if it had said: "It shall be lawful for any person whatsoever to apprehend any person whom on reasonable grounds he suspects of offending against this Act"—or, to take the precise offence in question, "any person whom on reasonable grounds he suspects to be loitering with intent to commit a felony." This is not what the section says; and if the Legislature had intended so to extend the very limited power of arrest without a warrant which exists at common law, I should have expected it to say so in clear language, having regard to the importance of the subject-matter in relation to the liberty of the subject. (See as an example s. 104 of the Larceny Act, 1861.) It is to be observed further that if the construction of the words "suspected person" is what the appellants say it is, the effect of this construction of s. 6 is, so far as regards the power of arrest, to make the words "suspected person" entirely otiose. However that

(1) 117 L. T. 306.

(2) 117 L. T. 304.

may be, the power of arrest—which, be it observed, is given not merely to constables, but to any person whatsoever—is in terms given by the section only where the person is "found offending," which I should have thought meant "found doing a thing which in fact constitutes an offence." It is said, however, that the matter is concluded by authority binding on this Court—namely, the case of *Trebeck* v. *Croudace.* (1) The provision under which the arrest was held to be justified in that case was s. 12 of the Licensing Act, 1872, which enacts that a person who, while drunk, is guilty of riotous or disorderly behaviour or is drunk while in charge on any highway of a carriage or in possession of loaded firearms may be apprehended and shall be liable to fine or imprisonment. The jury found that the sergeant of police who made the arrest honestly believed at the time that the plaintiff, a taxi-cab driver, was drunk. It was held that this finding entitled the defendant to judgment on the issue of false imprisonment. Swinfen Eady L.J. based his construction of the section, so far as it relates to the power of arrest, on the nature of the offences described. He said (2): "The cases mentioned in the section are all matters where it is reasonable to apprehend danger to life or limb." Further on he says: "The nature of the offences specified requires this construction." A similar reason is the basis of the judgment of Warrington L.J. He says (3): "It is to be observed that in each of the three cases mentioned in the second part of the section the apprehension of the person in question must be immediate if it is to serve the purpose for which it is obviously intended, namely, to prevent disorder or injury to the person in question himself or to others," and again (4): "In my judgment, considering the obvious purpose of the section, it ought to be construed so as to justify apprehension on reasonable suspicion of drunkenness." There does not appear to me to be any such reason of emergency in the case of some, at any rate, of the offences mentioned in s. 4 of the Vagrancy Act; and I do not think it would be permissible to construe s. 6 as justifying an arrest on honest suspicion in the case of some of those offences and not in others—it must be all or none. Bankes L.J. says (1): "Though the language in which this authority has been conferred varies greatly in different statutes, and in different sections of the same statute, the object of the Legislature must have been the same, namely, to provide for cases where, in the interests of public safety, or where danger to life or limb or property is threatened, prompt action is called for, and action which must of necessity be founded on the circumstances of the moment, and mainly probably on such information as the senses of a police constable, his sight and hearing, convey to him," and, in my opinion, in his case also this is the real basis of his decision. It is true that later on in his judgment (2) he uses language which appears to deal with all cases where power to arrest without warrant is given by statute, but I think that this language must be construed as dealing only with the case of statutes where the nature of the offence is of the kind described in the passage above quoted from his judgment. I cannot myself read this decision as extending to cases other than those where the nature of the suspected offence requires prompt action.

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(1) [1918] 1 K. B. 158.
(2) Ibid. 165.
(3) Ibid. 169.
(4) Ibid. 170.

Trebeck v. *Croudace* (3) was followed by a Divisional Court (Bankes and Scrutton L.JJ.) in *Isaacs* v. *Keech*. (4) There the arrest was justified under s. 28 of the Town Police Clauses Act, 1847. Under that section power is given to a constable to arrest without warrant "every common prostitute . . . . loitering and importuning passengers for the purpose of prostitution." The defendant honestly believed that the plaintiff was a common prostitute (which she was found not to be) and that she was committing the acts mentioned. It was held that this constituted a good defence to an action for false imprisonment. Bankes L.J. said (5): "I think, however, that the whole trend of authority has been to put a uniform construction upon enactments giving power to

(1) [1918] 1 K. B. 167.
(2) Ibid. 168.
(3) [1918] 1 K. B. 158.
(4) [1925] 2 K. B. 355.
(5) Ibid. 360.

arrest without a warrant a person found committing an offence, and to hold that what the Legislature has in mind is not a mere power to arrest the person ultimately found guilty of the offence, but is a power to be exercised by the proper authority of acting at once on an honest and reasonable belief that the person is committing the particular offence." This appears to me to go a great deal further than what was said in *Trebeck* v. *Croudace* (1) and lays down a principle of construction applicable to all cases where a statute gives power to arrest without warrant. Scrutton L.J. thought that the case was governed by *Trebeck* v. *Croudace* (1)—a decision with regard to which he apparently felt some doubts, which I respectfully share, particularly if, contrary to my own view, it is to be construed as extending beyond cases where in the nature of things prompt action is required. I am not myself prepared to write words into a section dealing with a subject-matter so important unless, on a fair construction of the section and its context or by reason of clear authority, I am compelled to do so, and in the present case I do not find either of these reasons. In the words of Pollock C.B.: "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute": *Bowditch* v. *Balchin*. (2)

If I am wrong in the view which I take as to this point and as to that with regard to "suspected person," I still hold that there is no sufficient allegation that either of the respondents was suspected to be "loitering" within the meaning of the statute.

The other two statutory provisions relied on are both contained in s. 513 of the Liverpool Corporation Act, 1921. This section empowers a constable to arrest: "(2.) Any loose idle or disorderly person whom he shall find disturbing the public peace or whom he shall have good cause to suspect of having committed or being about to commit any felony misdemeanour or breach of the peace or to instigate or abet any such breach; (3.) Any person whom he shall find between sunset and the hour of eight in the morning lying or loitering

(1) [1918] 1 K. B. 158.

(2) 5 Ex. 378, 381.

in any street yard or other place and not giving a satisfactory account of himself." With regard to the former of these two provisions, it is, in my opinion, clear that the defence contains no sufficient allegation that either of the respondents was a " loose idle or disorderly person." It is said that the particulars amount to an allegation that the plaintiffs were " idle " at the time when they were under observation. This appears to me to be hopelessly far-fetched, and I need only refer to what I have said above as to the necessity of precise pleading. With regard to the second provision quoted above, similar observations apply as to the absence of any sufficient allegation of the facts necessary to bring the case within it. I have already referred to the allegation of " loitering " when dealing with the Vagrancy Act. It is suggested that the particulars in effect allege that the respondents did not give a satisfactory account of themselves within the meaning of the provision. I cannot agree with this. If that was intended, the proper way of pleading was to say so in terms. The truth of the matter is, I think, that the defence was not framed with a view to the language used in any one of the three statutory provisions relied on, and I am not prepared to place an elastic construction upon it in order to bring it into accord with that language.

I agree that the appeal should be dismissed with costs.

SCOTT L.J. This case was disposed of by arrangement in the Court below as if the plaintiffs had put in a reply submitting that the defence disclosed no ground of defence in law to the cause of action alleged by the plaintiffs in the statement of claim ; in other words, it was tried almost as a demurrer on the simple issue of law as to whether the allegations in the defence did or did not afford legal justification for the action of the defendants in arresting the plaintiffs and then detaining them subsequently at the police station. No evidence was called because counsel for the defendants, in answer to a question from the learned judge, said that his evidence would not go beyond the pleaded justification, and, counsel for the plaintiffs being willing to assume that the facts alleged in the defence were true, the case was argued on that footing, inconsistent allegations in the statement of claim being disregarded. The trial began before a jury, but the jury were discharged by consent. The learned judge did not deliver a reasoned judgment, but we have had the advantage of reading a transcript of the whole argument and his reasons appear quite clearly from his observations made in the course of the discussion. I find myself in complete agreement with all that the learned judge said.

I concur in the conclusion of my brethren, but the case raises important questions affecting the rule of law and I prefer to state my reasons in detail.

No particular statute is pleaded in the defence as justifying the arrest, but if there is any general statute applying to the facts as pleaded in the defence the defendants were entitled to take advantage of it. The defendants relied at the trial and before us on three statutes: the Vagrancy Act, 1824, ss. 3, 4 and 6 (with subsequent amendments); the Municipal Corporations Act, 1882, s. 193, and the Liverpool Corporation Act, 1921, s. 513. The last, being a local and not a general statute, ought to have been pleaded; but this omission was waived by counsel for the plaintiffs at the trial, and by consent of both counsel the case was argued on the footing that if the facts alleged in the defence disclosed a justification within any one of the three Acts the defendants should be entitled to judgment, but if those allegations were not enough the plaintiffs should get judgment and be given 15*l.* each as damages.

It is to be observed that there was no allegation in the defence that on the occasion in question all or any of the conditions authorizing arrest, as specifically prescribed in the Acts, had been fulfilled by reason of the facts of the case alleged in the defence, as for instance that the plaintiffs were loose, idle and disorderly persons. None the less, having regard to the course taken at the trial, I think it is now incumbent upon us to assume that all necessary allegations of this kind were in fact made and to consider whether the alleged facts (including such assumptions) do or do not disclose a good defence in law under the statutes; although, whilst taking this course, I feel bound to add that, when by consent a trial proceeds on issues not pleaded, the necessary amendments ought to be in fact inserted in the record, in order both to prevent doubts at the trial itself and in the event of appeal to enable the Court of Appeal to know definitely what the issues were.

Our first step must be to scrutinize the provisions of the three statutes and see what precisely are the powers of arrest without warrant given to a constable and what conditions are attached. It is convenient to take the Vagrancy Act, 1824, first, both because it is earlier in point of time and because it was the last of a long line of enactments in pari materia, and ss. 3, 4 and 6 were largely a repetition of earlier legislation. Sect. 6 enacts that " it shall be lawful for any person whatsoever to apprehend any person who shall be found offending against this Act." Sects. 3, 4 and 5 define those offences. Sect. 3 relates to " idle and disorderly persons "; s. 4 to " rogues and vagabonds "; and s. 5 to " incorrigible rogues." Each section purports to make it a punishable offence to be " an idle and disorderly person," " a rogue and vagabond," or " an incorrigible rogue," as the case may be: but in none of them is the class treated as having any objective existence apart from the commission of the particular acts enumerated in the section. Sect. 3, for instance, does not assume that there is a recognizable class of person generally known as an " idle and disorderly person "; it describes a list of particular offences, the commission of any of which is to be deemed to constitute the offender an " idle and disorderly person " within the true intent and meaning of the Act. A person commits an offence under s. 3 by (1.) failing to maintain his family when able to do so; (2.) becoming chargeable on a parish from which he shall have been legally removed by order of justices; (3.) if a pedlar, by wandering abroad and plying without licence; (4.) if a prostitute, by wandering in the public streets and behaving in a riotous and indecent manner; (5.) by wandering abroad or taking up a position in a public place to beg, or causing children to do the same. It follows that for the purpose of this statute no one is "an idle and disorderly person" unless he has committed one or more of the above specific offences. It was not alleged in the defence that the plaintiffs were doing any of these particular things and consequently it could not be contended that the plaintiffs were idle and disorderly persons within the meaning of the Vagrancy Act, 1824. Sect. 4 which deals with "rogues and vagabonds" follows a similar method of approach: it does not purport to predicate the existence outside the section of a recognizable class of such persons, but, like s. 3, enumerates a series of specific offences and provides that every one of such offenders shall be deemed to be a "rogue and vagabond." This list in an abbreviated form is as follows: (1.) a second conviction under s. 3 as an "idle and disorderly person"; (2.) telling fortunes by palmistry or otherwise to deceive His Majesty's subjects—this was the old legislation against "the Egyptians" or gipsies; (3.) wandering abroad and lodging in barns, or unoccupied buildings, or elsewhere—meaning on private property—without having any visible means of subsistence; (4.) wilfully exposing to view in any street, etc., obscene prints, etc.; (5.) exposing the person in a public place with intent to insult any female; (6.) wandering abroad and endeavouring by the exposure of wounds and infirmities to obtain alms; (7.) going about as a collector of alms under any false pretence; (8.) running away and leaving a wife or child chargeable to the parish; (9.) betting in any street with any instrument of gaming; (10.) having in his possession housebreaking instruments with intent, etc.; (11.) being in possession of firearms, etc., with intent to commit a felony; (12.) being on various private premises for any unlawful purpose; (13.) being a suspected person or reputed thief and frequenting any place of public resort with intent to commit felony; (14.) being apprehended as an idle and disorderly person and violently resisting arrest and being subsequently convicted. All these persons "are to be deemed rogues and vagabonds" within the Act. It is unnecessary to discuss s. 5 about "incorrigible rogues" as it has no relevance. Of all the various acts described in s. 4, making a person amenable to arrest and punishment as a rogue and vagabond, there is only one upon which counsel for the defence relied in the court below and before us. This was the act described in the thirteenth item of the list—of which the actual words in detail so far as relevant are "every suspected person or reputed thief, frequenting any river, canal or navigable stream, dock . . . . wharf or warehouse . . . . or any street . . . . leading thereto or any place of public resort, or any avenue leading thereto, or any street . . . . adjacent, with intent to commit felony." Parliament in passing this provision evidently had in mind first the risk of thefts of goods from the kind of places where in those days merchandise awaiting or in course of transport was likely to be lying—namely, places connected with transport by water, substantially the main form of goods transport before railways; and, secondly, the danger of pickpockets in or near places of public resort. But the actual intent to commit a felony was plainly made an essential of the offence and, therefore, a condition of the power of arrest under s. 6, and in the court below counsel for the defendants in effect conceded that such an intent was not alleged and could not have been proved. The section has been amended subsequently several times and two of the amendments must be mentioned. By s. 15 of the Prevention of Crimes Act, 1871, the local limits of this particular provision were widened so as to include any street or highway or any place adjacent thereto. (This was to meet the decision in *Re Timson.* (1)) By the same section it was also enacted that "in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony." The result of the first amendment is no doubt to bring the two young plaintiffs at the telephone kiosk within the local ambit of the section; but the second amendment leaves felonious intent in fact an essential of the offence and, therefore, does not help the defendants, since it was not contended that the plaintiffs had in fact any intent to commit a felony. There was some discussion before us on the meaning of the phrase "suspected person" in s. 4, it being contended, as I understood, that it covered not only the case of a person who had already become on his previous record reasonably suspected by the police so as to bring him into a definite and quasi-objective category—on the analogy of the phrase "reputed thief"—but also a case where on the very occasion of arrest the arresting constable observes the person doing something which arouses his suspicion—a subjective instead of the quasi-objective criterion. I disagree with this construction both on the mere meaning of the English words standing alone and also by reason of the long history of the phrase in the Vagrancy Acts upon which I shall have more to say later. The contention for the appellants was put forward largely on the strength of *Hartley* v. *Ellnor* (1), it being submitted that that decision supports the proposition that, if it is proved that a constable has reasonable ground for suspecting and does suspect, the person thus suspected is brought within the statute. In my view this decision establishes no such proposition. Indeed it rather assumes the contrary, that the person must have already, before the occasion of arrest, passed into the category of suspected persons; for the Court in that case based its conclusion on the evidence that the person had for forty minutes previously in various incidents been behaving rather like a pickpocket, and thought this antecedent record sufficient. I find it difficult to understand the Court reaching that conclusion on the facts of that case, and on the whole I agree with Greene L.J. that it was wrongly decided; but in any view the case is no authority for the appellants' proposition.

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(1) (1870) L. R. 5 Ex. 257.

The result is that the Vagrancy Act neither in its original wording nor as amended in 1871 afforded the appellants any justification for arresting the respondents. There have been, however, certain other amendments which must be considered.

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(1) 117 L. T. 304; 81 J. P. 201.

The powers of arrest conferred by the Vagrancy Act were extended by s. 104 of the Larceny Act, 1861, which is in the following terms: "Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law." This section is not directly relevant but it is in pari materia and may properly be considered in connection with references to "suspicion" of crime and "suspected persons" in the relevant statutes. It is noticeable that the liberty of the subject is protected by the adoption of the objective test of "good cause to suspect," even although the person is already "lying or loitering" at night.

In 1882 by s. 193 of the Municipal Corporations Act of that year it was provided that "A borough constable may, while on duty, apprehend any idle and disorderly person whom he finds disturbing the public peace, or whom he has just cause to suspect of intention to commit a felony." In this statute also it will be noted that Parliament adopted the objective criterion of "just cause to suspect." It was argued for the appellants that the facts alleged in the defence brought the case within this statute; but I do not understand this argument. What ground was there for contending that the appellants had "just cause for suspecting" that the respondents were going to rob the money-box? They did not even know whether the respondents had any tools on them with which to prise it open; and they knew the respondents could not do it with their fingers.

Lastly, in 1891, by s. 7 of the Penal Servitude Act of that year, s. 4 of the Vagrancy Act, 1824, was amended by a provision that it should be "construed as if the provisions applying to suspected persons and reputed thieves frequenting the places and with the intent therein described, applied also

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to every suspected person or reputed thief loitering about or in any of the said places and with the said intent." This amendment by its final words brought the section into line both with s. 104 of the Larceny Act and with s. 193 of the Municipal Corporations Act, and made it plain that to constitute an offence under s. 4 and confer the right of arrest under s. 6 an actual intent to commit a felony was essential. Mere suspicion is not enough: see *Rex* v. *Pavitt* (1), a case heard in 1911 in the Court of Criminal Appeal of a man who had served two terms of imprisonment, one of five years and one of six months, with three years' police supervision, who was seen by a police officer going into private premises in a suspicious manner. He was questioned and gave certain more or less untruthful answers and was then arrested. He was convicted before the South London Sessions and sentenced to nine months' imprisonment, the charge being that he was found in a public place under such circumstances as to satisfy the Court that he was about to commit an offence punishable on indictment. But the Court of Criminal Appeal, consisting of Lord Alverstone C.J., Bray and Lord Coleridge JJ. quashed the conviction and Lord Coleridge J. said: "This Court has said before and now repeats that the provisions of this section of the Prevention of Crimes Act, being very stringent, must not be invoked on mere suspicion. There must be positive testimony to enable the police to bring a proper prosecution. Where the circumstances were consistent with the prisoner being in the public place for a purpose other than that suggested by the police there should be no prosecution." This judgment is clear authority for the views that my brethren and I are expressing in the present case.

The above considerations are more than sufficient to dispose of the contentions of the appellants so far as they sought to find a justification in the amended s. 4 of the Vagrancy Act, 1824. But even if there had been an arguable case under s. 4 they would have failed under s. 6, as the power of arrest there given to anybody—not only to the police—is limited to the case of a person found offending; and as the

(1) (1911) 75 J. P. 432.

Court (consisting of Cockburn C.J., Crompton, Hill and Blackburn JJ.) said in the case of *Horley* v. *Rogers* (1): "The facts sufficient to create the alleged offence were out of the knowledge of the constable. The summary power to apprehend without a warrant, given by the statute, applies only to cases where the offence is apparent and is in course of perpetration by the offender, before the eyes of the constable; not to cases where it depends upon circumstances unknown to the constable whether the offence has been committed or not." In the present case it is not alleged that the defendants had any such knowledge or that any offence was in course of perpetration before their eyes.

It remains to consider s. 513 of the Liverpool Corporation Act, 1921. So far as relevant it is as follows: "It shall be lawful for any police constable and all such persons as he shall call to his assistance to arrest and detain without warrant— . . . . (2.) any loose idle or disorderly person whom he shall find disturbing the public peace or whom he shall have good cause to suspect of having committed or being about to commit any felony misdemeanour or breach of the peace or to instigate or abet any such breach: (3.) Any person whom he shall find between sunset and the hour of eight in the morning lying or loitering in any street yard or other place and not giving a satisfactory account of himself." The two sub-sections call for separate consideration. Sub-s. 2 seems to predicate a definite class or classes of persons possessing what I have called an objective character and existence antecedent to and independent of the particular occasion. In spite of the disjunctive "or" I do not think that more than one class is intended. Even on the mere language of the sub-section I should read the "or" as meaning "and" on the simple ground that it would be absurd—in modern legislation—to put into a statute interfering with personal liberty such wide and indefinite words as "loose" or "idle." Why should such persons—in the ordinary English sense of those words—be selected for summary arrest? Surely Parliament could not have intended anything so

(1) (1860) 2 E. & E. 674, 677.

foolish. But there is a further reason for construing "or" as "and" in this section. The Act was a consolidating Act and these sub-sections were not new in 1921. They were a re-enactment of identical provisions contained in s. 276 of the Liverpool Improvement Act of 1842 (5 & 6 Vict. c. cvi.) (repealed in 1921), and appeared in that Act as one undivided section. It is true that the word "or" was there present: but I find that s. 276 of the Liverpool Act of 1842 was copied bodily from s. 18 of the private Act of 1839, for regulating the police in the City of London (2 & 3 Vict. c. xciv.) (see *Bowditch* v. *Balchin* (1), where it is quoted in the argument); and in the London Act the word is "and" and not "or." I cannot imagine Parliament in 1842 changing the "and" in the London Act into "or" in the Liverpool Act intentionally, and in order to express a different idea, without also changing the other language of the section so as to make the new meaning clear. I therefore infer that the change was not intended and was a clerical error. In the case of *Bowditch* v. *Balchin* (2) the Court apparently held that there was no power to arrest unless (*a*) the person arrested fell within the class described by the words "loose idle and disorderly" and (*b*) the constable had ocular or other evidence of his senses of the commission of the offence or of an intention to commit it. The same considerations apply to the defence based on sub-s. 2 of s. 513 of the Liverpool Corporation Act, 1921, in the circumstances pleaded in the present case. I therefore hold that the defence contains no effective allegation of facts showing either that the respondents were within the class of "loose idle and disorderly persons" or that the constables had "good ground to suspect them," etc., both of which are essential to sub-s. 2.

Sub-s. 3 raises two questions: do the facts relied on disclose (*a*) a case of "lying or loitering," (*b*) a failure by the respondents to "give a satisfactory account of themselves"? In my opinion they disclose neither. "Lying" differs from "loitering" as it seems to me only in that whilst the latter word imports movement the former imports absence of movement, with perhaps a hint of attempted concealment. The Oxford Dictionary defines "loitering" in its early use as "vagrancy, vagabondage, or leading a vagabond's life"; and "loiterer" as "a vagabond or sturdy beggar." For reasons which I will presently state I think this is the true meaning of the word in this statute. If this is right the word "loitering" would colour the more neutral word "lying" on the maxim of noscitur a sociis; and there is nothing in the facts on which the defence was based to show that the respondents' conduct was either "lying" or "loitering" in that sense.

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(1) 5 Ex. 378, 380.

(2) Ibid. 378.

Even if I am wrong in this view, there are two other grounds for concluding that sub-s. 3 does not help the appellants. It must be read in the light of sub-s. 2, particularly as the two sub-sections were formerly undivided; and, so read, I think the words "not giving a satisfactory account of himself" refer back to the words "shall have good cause to suspect" and must certainly in this context mean failing to give an account which, if not removing all suspicion from the mind of the constable, at any rate would show him that there was no "good ground" for suspicion of actual crime committed or intended. If so, for this reason also sub-s. 3 does not help the appellants. The other ground is that a local Act dealing with a topic also covered by general public statutes ought, in case of any ambiguity in the local Act, to be construed in the light of the general law of the land. This principle applies to sub-s. 3 and makes it right to interpret the phrase "satisfactory account" in the light of provisions like s. 104 of the Larceny Act, 1861, and s. 193 of the Municipal Corporations Act, 1882, both of which require the existence of "good cause" for the suspicion.

I do not think it necessary to add much about the two cases of *Trebeck* v. *Croudace* (1) and *Isaacs* v. *Keech* (2), which were discussed before us, because I agree with the whole of what Greene L.J. has said about them and desire to adopt it as part of this judgment. But I feel bound to add a caveat. If the Court of Appeal in the former case actually held that where the offence, for which a constable

(1) [1918] 1 K. B. 158. (2) [1925] 2 K. B. 354.

has it in mind to arrest a person, is one of immediate importance to public order, he is empowered to act on a reasonable belief that the crime has been committed or that the intent to commit it is present, even although the statute does not contain any express words to that effect—if that is the law of this country (and until revised by the House of Lords it is), a very difficult discretion is entrusted to the police, and one, as I think, fraught with considerable danger to the liberty of the subject. I should like respectfully, but earnestly, to express the opinion that powers of arrest without warrant should be expressed in quite unambiguous and simple language which any one can understand, and also that the occasions when the constable may rely on his discretion should be defined with care in any statutory provision conferring such a power.

Although the conclusion that s. 513 of the Liverpool Corporation Act, 1921, affords no justification for the defendants can be reached, as both my brethren and myself have in fact reached it, without praying in aid any peculiar sense imparted to the two expressions " idle and disorderly persons " and " loitering " by their use in a very large number of previous statutes in pari materia, in my view those phrases have acquired a statutory meaning of that kind, and one which is directly relevant to the submission of the appellants founded upon that section. It leads us by a different road to the same conclusion as that which we have already stated. So construed s. 513 is restricted to a class of persons to which it is quite impossible to hold that the two respondents —perfectly respectable citizens of unimpeachable character— belonged. The same considerations apply to both sub-s. 2 and sub-s. 3; for the word " loiterer " was habitually and indifferently used in the old statutes as having the same meaning as " idle and disorderly person," the meaning which I have already quoted from the Oxford Dictionary. In my view those two expressions both refer to members of a class once prevalent in England to an extent which made it for four or five centuries a major political problem, a problem which taxed the forces of law and order to the uttermost and produced a long succession of repressive statutes. These laws were framed exclusively in relation to that particular class of the community and had three purposes. The class consisted of the hordes of unemployed persons, many of them addicted to crime, then wandering over the face of the country; and the purposes were: (*a*) settlement of the able-bodied in their own parish and provision of work for them there; (*b*) relief of the aged and infirm, that is, those who could not work; (*c*) punishment of those of the able-bodied who would not work. The early Vagrancy Acts came into being under peculiar conditions utterly different to those of the present time. From the time of the Black Death in the middle of the 14th century till the middle of the 17th century, and indeed, although in diminishing degree, right down to the reform of the Poor Law in the first half of the 19th century, the roads of England were crowded with masterless men and their families, who had lost their former employment through a variety of causes, had no means of livelihood and had taken to a vagrant life. The main causes were the gradual decay of the feudal system under which the labouring classes had been anchored to the soil, the economic slackening of the legal compulsion to work for fixed wages, the break up of the monasteries in the reign of Henry VIII., and the consequent disappearance of the religious orders which had previously administered a kind of "public assistance" in the form of lodging, food and alms; and, lastly, the economic changes brought about by the Enclosure Acts. Some of these people were honest labourers who had fallen upon evil days, others were the "wild rogues," so common in Elizabethan times and literature, who had been born to a life of idleness and had no intention of following any other. It was they and their confederates who formed themselves into the notorious "brotherhood of beggars" which flourished in the 16th and 17th centuries. They were a definite and serious menace to the community and it was chiefly against them and their kind that the harsher provisions of the vagrancy laws of the period were directed.

It is unnecessary to go into further historical detail; the broad features of the class can be found in any history of the labouring classes—see, for instance, Webb's English Poor Law History, Part I. The statutory history of Parliamentary attempts to deal with the class goes back to the Statute of Labourers in 1349; but for the purpose of this judgment I can begin with 11 Henry 7, c. 2 (1494), which provided that: "Vagabonds, idle, and suspected persons, shall be set in the stocks, three days and three nights, and have none other sustenance but bread and water, and then shall be put out of the town: (2.) And whosoever shall give such idel person more, shall forfeit xii. d. (3.) Every beggar not able to work, shall report to the Hundred where he last dwelled, is best known, or was born, and there remain, upon the pain aforesaid."

22 Henry 8, c. 12 (1530), directed "how aged, poor, and impotent persons, compelled to live by alms, shall be ordered, and how vagabonds and beggars shall be punished."

27 Henry 8, c. 25 (1535), compelled every sturdy vagabond to be kept in continual labour; Governors of Shires, etc., to find and keep every poor and infirm, or aged person who was born or had dwelt three years within their limit, and s. 3 says: "A valiant beggar, or sturdy vagabond, shall at the first time be whipped and sent to the place where he was born or last dwelled by the space of three years, there to get his living; and if he continue his roguish life, he shall have the upper part of the gristle of his right ear cut off; and if after that he be taken wandering in idleness, or doth not apply to his labour, or is not in service with any master, he shall be adjudged and executed as a felon."

1 Edw. 6, c. 3 (1547), the notorious "Slavery Act," was entitled "An Acte for the punishment of Vagabondes and for the Reliefe of the Poore and Impotent Parsons," and its preamble was in these terms: "Forasmuche as Idlenes and Vagabundrye is the mother and roote of all theftes robberyes and all evill actes and other mischiefs and the multitude of people given therto hath allwaies been here within this Realme verie greate and more in nombre as it maye appere then in other Regions, to the greate impouverishment of the Realme

and daunger of the Kings Highnes Subjects, The which Idlenes and Vagabundrye all the Kings highnes noble progenitors Kings of this Realme and this highe Courte of Parlament hath often and with greate travaile goon abowte and assayed with godlie Actes and Statutes to represse, Yet untill this our tyme it hath not had that successe which hath byn wisshed, But partelie by folishe pitie and mercie of them which shoulde have seen the said godlie Lawes executed, partelie by the perverse nature and longe accustumed Idlenes of the parsons given to loytringe, the saide godlie Statutes hitherto hath had small effecte, and Idle and Vagabounde persons being unprofittable membres or rather ennemyes of the Comen wealthe hath byn suffred to remayne and encrease and yet so doo, who yf theie should be punished by deathe whippinge emprysonement or with other Corporall payne it were not withowt their deserts for thexample of others and to the benefitt of the Cōmen wealth, Yet yf thei cowlde be brought to be made proffitable and doo svice it were much to be wisshed and desired . . . ." The whole Act deserves perusal, although it only remained on the Statute Book two years, for the sake of the picture of the times which it presents. But it is enough for the purpose of my judgment to recall that the Act " ordained that all idle vagabonds should be made slaves, and fed upon bread and water, or small drink and refuse meat ; should wear a ring of iron round their necks, arms or legs, and should be compelled by beating, chaining or otherwise to perform the work assigned them . . . ." (see Stephens' Commentaries, 12th ed., vol. ii., p. 234). This Act was repealed two years later and a scheme for dealing with the poor was drawn up in 1553 by a committee of twenty-four citizens of London. Holinshed (quoted by Webb, English Poor Law History, Part I., p. 49) records that " after sundry meetings - . . . they agreed upon a book that they had devised, wherein they first considered of nine special kinds and sorts of poor people, and these same they brought in these three degrees : (1.) the poor by impotency ; (2.) poor by casualty ; (3.) thriftless poor." The last class was divided into (*a*) " the rioter that consumeth all " ; (*b*) " the vagabond that will abide in no place"; (*c*) "the idle person, as the strumpet, and others." The spirit of all the 16th and 17th century statutes was that of helping classes 1 and 2 and punishing class 3—the thriftless poor—more or less severely, according as its members were inclined to cling to, or give up, their vagrant way of life.

14 Eliz., c. 5 (1572), is the forerunner of the Vagrancy Act, 1824: it gives in s. 5 a lengthy catalogue of the persons who shall be deemed rogues, vagabonds and sturdy beggars. This includes "all common labourers being persons able in body using loitering, and refusing to work for such reasonable wages as is taxed and commonly given . . . ." It also ordains (s. 2) that persons above the age of fourteen "being hereafter set forth by this Act . . . . to be rogues, vagabonds or sturdy beggars and . . . . taken begging in any part of this realm, or taken vagrant wandering and misordering themselves contrary to the purport of this present Act . . . ." shall be punished.

39 Eliz., c. 4 (1597), defines rogues and vagabonds on the same lines as the Act of 1572; s. 2 again refers to "persons able in body using loitering" and refusing to work for reasonable wages, and in s. 3 provides that: "Every person which is by this present Act declared to be a rogue, vagabond or sturdy beggar which shall be . . . . taken begging, vagrant wandering or misordering themselves . . . ." is to be whipped. In the same year a further statute was passed, chap. 17, entitled "An Act against lewd and wandring persons, pretending themselves to be soldiers or mariners." Sect. 2 enacts that "all idle and wandring soldiers or mariners, or idle persons . . . . shall settle themselves in some service, labour or other lawful course of life, without wandring, or otherwise repair to the places where they were born, or to their dwelling places, if they have any, and there remain, betaking themselves to some lawful trade or course of life, as aforesaid; upon pain that all persons offending contrary to this Act to be reputed as felons, and to suffer as in case of felony, without any Benefit of Clergy to be allowed."

These last Acts contained the germ of the 19th century workhouse in their provision of "Houses of Correction" where the able-bodied, idle and disorderly should be made to work. And it is also perhaps permissible to note—even if not directly relevant to this appeal—that out of the Acts of Elizabeth's reign, which I have cited, directly grew her Act of 1601, the foundation of our poor law and rating systems.

The Act of 7 James 1, c. 4 (1609), sought to enforce more rigorously "all laws and statutes now in force . . . . for punishing of rogues, vagabonds and other wandering and idle persons," and setting them to work in Houses of Correction.

An Act passed in 1713 (13 Anne, c. 26) continued the same type of legislation, and in 1739 (13 Geo. 2, c. 24) an Act was passed for "amending and enforcing the laws relating to rogues, vagabonds and other idle and disorderly persons, and for reducing the same into one Act of Parliament; and also for amending the laws for erecting, providing and regulating Houses of Correction."

This codifying Act was followed by another in 1744 (17 Geo. 2, c. 5), and then in 1792 by 32 Geo. 3, c. 45. These last three Acts are all on the same lines in their treatment of idle and disorderly persons as offenders to be punished if they will not work.

The Vagrancy Act of 1824 differs little from the long string of earlier Acts in the Legislature's attitude to the class of idle and disorderly persons except that it is simply a punishment Act, and not, as the earlier Acts were, partly a punishment Act and partly an Act for the relief of the poor. There runs all through this chain of statutes the recognition of a well known and notorious class of unemployed poor persons dealt with as such by Parliament according to their willingness or unwillingness and their ability or inability to work. The phrases "idle and disorderly" and "those who use loitering" are recurrent and both apply to the class. When those phrases appear again in statutes of the 19th century passed not long after the Act of 1824, which was the last of the series, they should not, in my view, be interpreted in a sense foreign to that in which they had previously been used.

It may be said that my historical statements and my recital of extracts from the long line of Vagrancy Acts do not establish any precise sense for the two expressions in the Liverpool Act which I have construed in this appeal. I do not dissent from that criticism; but it is beyond dispute that there was in our earlier history an unemployed class which was only too well known and always regarded as a public menace, and that it was this class which was intended by all the expressions "idle and disorderly persons," "persons using loitering," "rogues and vagabonds" and "sturdy beggars." That the class was treated as semi-criminal is also beyond argument: they were referred to by such phrases as "outrageous enemies to the common weal" (see 14 Eliz., c. 5, s. 2).

When the local Act of 1839 for regulating the police in the City of London (2 & 3 Vict. c. xciv.) was passed the phrase "loose, idle, and disorderly" persons must, in my view, be presumed to have been used by Parliament in the same sense as before—namely, as applying to an unemployed idle class given to preying on those who worked or were possessed of other means; and if the phrase was used in the London Act of 1839 in that sense, it must equally have been used in the Liverpool Act of 1842 in the same sense. Finally that same sense must be attributed to the consolidating Act of 1921. If that interpretation be sound, the position in the appeal is that in the conduct of the defence there was no hint of an allegation that the two plaintiffs belonged to any such class, and unless they did, s. 513 had no application to them. This reasoning constitutes a separate and additional ground for affirming the judgment below.

I cannot part with the case, however, without making two observations. It seems to me wrong that these old phrases should still be made the occasion of arrest and prosecution, when in their historical meaning they are so utterly out of keeping with modern life in England. The class against which the legislation was directed has ceased to exist. The poor law legislation and the increased industrial and commercial employment of the 19th century together reduced it to much narrower proportions. The legislation of the

20th century, unemployment insurance, national health insurance, public assistance and all the other social reforms of recent years, have abolished it altogether. The old phrases have to-day lost their meaning, but they remain on the Statute Book as vague and indefinite words of reproach. Is it not time that our relevant statutes should be revised and that punishment and arrest should no longer depend on words which to-day have an uncertain sense and which nobody can truly apply to modern conditions? To retain such laws seems to me inconsistent with our national sense of personal liberty or our respect for the rule of law. Clear and definite language is essential in penal laws.

Finally I would make one more suggestion. If the Liverpool Act of 1921, s. 513, and the old London Act of 1839, s. 18 (which is, I believe still in force), create different offences and confer different powers of arrest from those of the general law of the land contained in the public statutes, it is surely time to abandon the system of such local variations, whatever may have been their justification in earlier times. To-day crime and personal liberty ought not to vary from town to town as must be the case if they are to depend on municipal variations in "local and personal" Acts of Parliament. They ought to be the same throughout the length and breadth of the land. Why should such provisions be inserted in local Acts at all?

I agree that the appeal should be dismissed and the judgment below affirmed.

Appeal dismissed.
Leave to appeal to the House of Lords granted on the Liverpool Corporation undertaking to pay the respondents' costs in any event.

Solicitors for appellants: *F. Venn & Co., for Walter Moon, Town Clerk, Liverpool.*

Solicitors for respondents: *John A. Behn, Twyford & Reece, Liverpool.*

R. F. S.

C. A.

1936

Oct. 16; Nov. 2.

KIRK *v.* EUSTACE.

Husband and wife—Separation deed—Covenant by husband to pay weekly sum to wife " during her life "—Death of husband—Determination of liability under covenant.

By a deed made in 1922 providing for a separation between husband and wife, and containing mutual covenants to live separate and apart, the husband covenanted with his wife to pay her the weekly sum of 2*l*. during her life for her maintenance and support, but determinable upon reconciliation.

In 1936 the husband died. The widow claimed that his estate was liable to continue paying the maintenance during the rest of her life, but the executors contended that the liability had come to an end.

The county court judge gave judgment in favour of the wife:—

Held, by Slesser and Scott L.JJ. (Eve J. dissenting) that the contract, being an agreement for separation, was based on the assumption that both parties should be living at any time when it was sought to enforce it, that on the death of the husband the whole substratum of the contract was gone, and therefore that all liability under the husband's covenant had come to an end, and the appeal must be allowed.

In re Gilling; Procter v. *Watkins* (1905) 74 L. J. (Ch.) 335 approved.

Per Eve J. (dissenting). The contract expressly provided that the payment of 2*l*. a week to the wife should continue during her life, and there was nothing in the language used to show any intention of basing the whole contract on a condition which involved the necessity that both parties should be living at any time when it was sought to enforce it.

APPEAL from a decision of the deputy judge of the County Court at Kingston-upon-Hull.

By a deed dated September 23, 1922, made between Thomas Levitt Kirk and Annie Mary Kirk, his wife, who were married in 1912, after recitals that unhappy differences had arisen between the parties, that they had mutually agreed to live apart from each other for the future, and that the husband had agreed to pay his wife a clear weekly sum of 2*l*. during her life for the maintenance and support of herself subject nevertheless to the provisos and conditions therein contained, it was witnessed that in pursuance of the agreement and in consideration of the premises the husband thereby covenanted with the wife (*a*) that she might at all times thereafter live apart from him and either in or out of business and in such a manner as she should think fit; (*b*) that he would not in any manner annoy, molest, disturb, or otherwise interfere with her person or business or in her manner of living, nor at any time thereafter require, or by any means either by taking out citation or process or by instituting any action in England or elsewhere or otherwise endeavour to compel her to cohabit with him, or to enforce any restitution of conjugal rights, or for that purpose or otherwise use any force, violence, or restraint to her person, or sue or cause to be sued any person or persons for receiving, lodging, or entertaining her, but that she might in all things live as if she were unmarried without the restraint or correction of the covenantor or of any other person or persons by his consent; and (*c*) that he would weekly during the life of Annie Mary Kirk on condition that and so long as she should continue to lead a chaste life pay or cause to be paid to her or to such person or persons as she should from time to time direct or appoint in writing the clear weekly sum of 2*l.* without any deduction whatsoever for the separate use and benefit of Annie Mary Kirk and for the maintenance of herself, the first payment to be made on the execution of the now stating indenture.

And in consideration of the premises Annie Mary Kirk thereby covenanted with Thomas Levitt Kirk—(*a*) that she would at all times thereafter keep Thomas Levitt Kirk indemnified against all debts and liabilities which Annie Mary Kirk might thereafter contract, and from all actions, claims, and demands on account thereof, and against all such costs, charges, losses, damages, and expenses as might be incurred by the said Thomas Levitt Kirk on account thereof; (*b*) that neither Annie Mary Kirk, nor any person on her behalf, should at any time thereafter molest, annoy, disturb, or otherwise interfere with Thomas Levitt Kirk, or by any means either by taking out citation or process or by instituting any action in England or elsewhere, or in any other manner, compel Thomas Levitt Kirk to cohabit with Annie Mary Kirk, or endeavour to enforce any restitution of conjugal rights, or

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to compel Thomas Levitt Kirk to allow her any alimony or maintenance further than the weekly sum of 2*l.*; (*c*) that in case Thomas Levitt Kirk should at any time thereafter be called on to pay and should actually pay any debt or debts which Annie Mary Kirk should at any time thereafter contract, then and in every such case it should be lawful for Thomas Levitt Kirk to retain out of the weekly sum of 2*l.* the amount of such debt or debts together with all costs, charges, and damages which he might incur on account thereof.

And it was thereby agreed that in case Thomas Levitt Kirk and Annie Mary Kirk should at any time thereafter with their mutual consent cohabit as man and wife, then and in such case the weekly sum of 2*l.* should be no longer payable and all the covenants thereinbefore contained should become void.

There was no reconciliation between the parties and the husband regularly paid the 2*l.* a week to his wife until February 16, 1936, when he died, having by his will appointed the defendants his executors. Mrs. Kirk claimed from them the 2*l.* a week as being still payable to her, and on their refusal to pay sued them for arrears in the Kingston-on-Hull county court. The deputy judge gave judgment in her favour, holding that her husband's estate was liable under his covenant under s. 80 of the Law of Property Act, 1925.

The executors of Thomas Levitt Kirk appealed.

Willoughby Jardine K.C. and *Grattan Doyle* for the appellants. The separation deed only operates during the joint lives of husband and wife, and if either one of them dies the rights and liabilities under it come automatically to an end. Therefore the words " during her life," having regard to the context, particularly the dum casta condition, cannot mean " during the whole of her life," but " during her life so long as the husband shall live."

The decision in *Clough* v. *Lambert* (1) on which the learned judge relied, does not affect the present case. There there was a covenant to pay an annuity to a trustee for the wife

(1) (1839) 10 Sim. 174.

during her life. It was a covenant entered in by the husband for himself his executors administrators and assigns, and it was held that it could be enforced against the executors, but not against the creditors of the husband. In *Webster* v. *Webster* (1) the husband was still living. In *In re Gilling; Procter* v. *Watkins* (2) Kekewich J. held on the construction of a separation deed under which an annuity was payable to a wife " during her life " that it ceased on the death of the husband. In *Nicol* v. *Nicol* (3) the annuity to the wife came to an end on the resumption of cohabitation.

Here there is a proviso as to resumption of cohabitation, which shows that this is a separation deed and not a post-nuptial settlement.

[They also referred to *Negus* v. *Forster* (4) and *Charlesworth* v. *Holt*. (5)]

Richard Elwes for the respondent. There is nothing to warrant the assumption that the maintenance payable to the wife during her life ceased on her husband's death. That was not decided on similar words in *Nicol* v. *Nicol* (3): see *May* v. *May*. (6)

The husband might have introduced words into the deed limiting his liability in the covenant to his own life, but he did not do so. The common form generally used in separation deeds is " during the joint lives " of the parties. See Encyclopædia of Forms and Precedents, 2nd ed., vol. ii., Separation Deeds Form No. 93, and particularly the footnote to the form on p. 235 f.n. (p.) emphasizing the necessity of stating distinctly whether the maintenance is to be paid during the rest of the wife's life or only during the joint lives.

[SLESSER L.J. How can persons be said to be living apart from each other when one of them is dead ?]

I agree they cannot, but this agreement deals with a possible reconciliation only, and says nothing about divorce or death as a possible event.

Sect. 80 of the Law of Property Act, 1925, applies, under

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(1) (1853) 4 De G. M. & G. 437.
(2) 74 L. J. (Ch.) 335.
(3) (1886) 31 Ch. D. 524.
(4) (1882) 46 L. T. 675.
(5) (1873) L. R. 9 Ex. 38.
(6) [1929] 2 K. B. 386.

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which the husband's real and personal estate are bound, in the absence of an expression of intention to the contrary. Here no contrary intention is expressed: see *Clifford* v. *Clifford* (1) and *Charlesworth* v. *Holt.* (2)

The decision in *In re Gilling* (3) is distinguishable from the present case, as there the words used were quite different. The covenant was expressed as a conditional covenant. Here the covenant to pay and the mutual covenants to live apart are entirely independent.

But if *In re Gilling* (3) cannot be distinguished from this case, then it is submitted that it was not rightly decided. The covenant is not in the ordinary common form: see Lush on Husband and Wife, 4th ed., p. 444, and footnote thereon, where the author says that the words to be employed in a separation deed require careful attention.

Willoughby Jardine K.C. replied.

Cur. adv. vult.

1936. Nov. 2. Slesser L.J. This appeal arises out of a claim made by Annie Mary Kirk, the widow of Thomas Levitt Kirk, against the executors of his estate for a sum of money alleged to be due under a deed of marital separation dated September 23, 1922. [His Lordship referred to the terms of the deed and continued :] The contention of the defendants is that the obligation to pay the money ceased at the death of the husband and is not binding on the estate. The widow relies on the express words in the covenant to pay during her life and points to the fact that there is no provision in the deed for the ending of payment on the death of her husband. The deputy county court judge decided in favour of the wife's contention, and from that decision the executors appeal. Under s. 80, sub-s. 1, of the Law of Property Act, 1925, repeating in effect the provisions of the repealed s. 59 of the Conveyancing Act, 1881, it is provided that a covenant or contract under seal binds the real estate as well as the personal estate of the person making the same if and so far as a contrary

(1) (1884) 9 P. D. 76.
(2) L. R. 9 Ex. 38.
(3) 74 L. J. (Ch.) 335.

intention is not expressed in the covenant or contract. In my opinion, however, in this contract a contrary intention is expressed and this section, therefore, does not avail the plaintiff.

I come to this conclusion for the following reasons: I am of opinion that the language of this indenture, when properly considered, shows an intention to base the whole contract on the assumption that the parties, as is recited, have mutually agreed to live apart from each other. I think that such a basic condition involves the necessity, if the contract is to operate, that both parties are living at any time when it is sought to enforce the deed and that they cannot properly be said to be living apart within the meaning of the agreement when one of them is dead. Such an assumption is expressly to be found in clause 1 (*a*), which provides that the plaintiff may at all times thereafter " live apart from the said Thomas Levitt Kirk," and also impliedly in the provision in clause 1 (*b*) that he shall not in any manner annoy, molest, or disturb or otherwise interfere with her. There is a complementary clause—2 (*b*)—binding her not to molest him.

It is true that it has been decided by authority that the mere fact of divorce by one or other of the spouses will not operate to destroy the effect of the deed so far as it remains applicable. The leading case on this matter is *Charlesworth* v. *Holt.* (1) There the provision was that the defendant should pay an annuity for his wife's support during their joint lives and so long as they should live separate and apart. The wife subsequently misconducted herself and the husband obtained a divorce, but the language of the deed, though in the words of Baron Pigott " neither party contemplated the dissolution of the marriage," was held to be too strong to end the husband's obligation. As the same learned judge pointed out: " He covenants to pay this annuity absolutely so long as he and Lucy Holt live apart." Moreover, as was said by Chief Baron Kelly: " The husband might, in this case, have introduced express words limiting his liability to the period during which Lucy Holt remained his wife. But there are no such words, and Mr. Holker has not satisfied me that any words

(1) L. R. 9 Ex. 38, 40, 42.

are used which necessarily imply that the covenant is only to be binding during the continuance of the marriage tie."

That decision was followed in *May* v. *May*. (1) There the obligation was that the husband "shall and will during the life of the wife . . . . pay to the wife" an annual sum. The husband committed adultery and the wife obtained a decree. He then defaulted in his payments. It was held that the deed was not subject to any implied term that it should only operate so long as the marriage relation continued to exist. As Scrutton L.J. pointed out: "Can it be said that all husbands and wives who have executed deeds of separation must have made their bargains on the footing that the relation of husband and wife should in each case continue? Separation agreements have been drafted which provide that they shall continue valid although that relation should cease to exist."

But those decisions proceed on the footing that both parties survive. They seem to me altogether distinguishable from a case, such as the present, where, in my view, the whole substratum of the contract that the spouses are living apart (whether as husband and wife or otherwise) has gone. In the language of Lord Loreburn in *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products Co., Ld.* (2) "The parties must have made their bargain on the footing that a particular thing or state of things would continue to exist." If the deed were one which was made to depend on matters other than separation, as was the case in *Negus* v. *Forster* (3), where the deed did not depend on the continuance of separation, other considerations would apply and the death of the husband would not necessarily destroy the substratum of the contract. If the trusts of the deed are in effect a permanent settlement, the annuity continues payable by the executors after death: *Atkinson* v. *Littlewood*. (4) But the present case is clearly one of a separation deed having, in the language [used during the argument] of Lord Coleridge C.J. in *Negus* v. *Forster* (3): "its one and only object separation"

(1) [1929] 2 K. B. 386, 394.
(2) [1916] 2 A. C. 397, 403.
(3) 46 L. T. 675, 676.
(4) (1874) L. R. 18 Eq. 595.

and no more, seeing that, among other matters, there is provision in clause 3 that " in case the said Thomas Kirk and Annie Mary Kirk shall at any time hereafter with their mutual consent cohabit as man and wife, then and in such case the said weekly sum of two pounds shall be no longer payable and all the covenants hereinbefore contained shall be void." See also *Bateman* v. *Countess of Ross* (1) ; *Randle* v. *Gould* (2)—a case of absolute provision held to be a post-nuptial settlement—and *Nicol* v. *Nicol* (3). In the first edition of Lush on the Law of Husband and Wife, published after the Conveyancing Act, 1881, and notwithstanding the judgment in *Charlesworth* v. *Holt* (4) in 1884, the eminent author is unambiguously of opinion, as expressed at p. 379, that " if the marriage relation was at an end through the death of one of the parties, the trusts of a *mere* separation deed would be necessarily extinguished." The only authority which seems to be directly in point, *In re Gilling ; Procter* v. *Watkins* (5), is to the like effect. In that case the provision was that the husband should pay the wife a certain sum for her sole and separate use during her life if she should so long continue to live separate and apart. The husband died and a summons was issued by one of the executors of the husband's will to determine whether the obligation to pay the wife had ceased on the death of the husband, or whether the executors were bound to provide for the annuity out of his estate. Kekewich J. spoke of the apparent novelty of the question raised, but he pointed out (6) that a woman could not fulfil the character of remaining separate and apart from her husband when he was dead.

In my view, the decision of Kekewich J. was right, and the death of the husband has put an end to this covenant just as much as it would have had the covenant been expressed to be for the joint lives of the contracting parties.

It follows that the appeal should be allowed.

SCOTT L.J. I agree with the judgment of Slesser L.J.

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(1) (1813) 1 Dow, 235.
(2) (1857) 8 E. & B. 457.
(3) 31 Ch. D. 524.
(4) L. R. 9 Ex. 38, 40, 42.
(5) 74 L. J. (Ch.) 335.
(6) Ibid. 336.

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This appeal depends on the true interpretation of one particular deed of separation. In my opinion, its language, construed in accordance with ordinary principles of legal interpretation, is quite clear and unambiguous. I think that the learned deputy judge was wrong and that the appeal ought to be allowed. The only hesitation I have felt is due to the fact that Eve J. dissents from the interpretation which Slesser L.J. and I put on the deed.

The essentials of the agreement contained in the deed are, first, that the two parties will separate forthwith; secondly, that thereafter they will keep separate by "living apart"; and, lastly, that their relations while so living apart shall be regulated by a series of mutual promises. The initial agreement to "live apart" necessarily imports an undertaking by each to take action for the purpose. The relationship described by that phrase once established has to be maintained permanently: that mutual undertaking equally imports action by each; it means that each must continue throughout the duration of the agreement to implement by appropriate conduct his or her promise to live separately. The performance by each of his or her promise for which the agreement calls is thus at every moment voluntary and therefore involves conscious and deliberate action by each party. The instrument relates only to a state of things which is voluntary—voluntary in initiation, voluntary in maintenance—no involuntary separation can properly be said to come within the words "living apart." Conscious and deliberate action by each so as to ensure that they do "live apart" is of the essence. It is both the original and the continuing basis of the agreement. That basis is thus of necessity a fundamental condition the failure of which brings the agreement to an end simply because it has no application to such a state of affairs. It comes to an end because it predicates continuing action by both parties, and when one dies it cannot go on. In truth, the present case is a perfect illustration of the doctrine of frustration in the law of contract. When the hand of death eliminates one party the voluntary action of both, which is the essential characteristic of "living apart," ceases to be possible. Voluntary separation ceases. Mutuality has gone. Two people cannot " live apart " when one is dead. It follows, therefore, that separation by death, being a different kind of separation from that with which the deed is concerned, dissolves the contract.

No doubt a clause could be drafted by which an obligation binding on the husband's estate after his death might have been imposed. But that is only to say that this deed, instead of being drawn as a mere separation deed, might have included the terms of a post-nuptial settlement. I can see no words which justify such an implication in this deed. The provision of sub-s. 1 of s. 80 of the Law of Property Act, 1925, does not apply to a deed which " expresses a contrary intention." If this deed is one which on its proper interpretation is terminated by death, it must be read as expressing an intention that none of its covenants shall be enforceable thereafter by the survivor, and that is a " contrary intention " within the section.

The only other aspect of the case on which it is necessary to say anything is the suggestion, which was, I think, more or less put forward, that a decision reversing the judgment of the learned deputy judge would be contrary to the view generally entertained as to the meaning of deeds of separation in this form, and that it would upset existing practice. I do not doubt that where a particular construction has for many years been put on ambiguous language in a common form document, particularly in commercial matters, a Court may properly have regard to such practice, if there is any real ambiguity in the document. In the present case, however, not only is there no material before us from which to conclude that there is any general practice based on the interpretation adopted by the learned deputy judge in the case of deeds of separation in the same form and wording as the one we are construing, but, in my view, there is in this deed no real ambiguity at all. Speaking for myself, therefore, I feel bound to give it the interpretation which seems to me to be clearly indicated by the language used. I may also add that if there be any " practice " of the kind suggested, it must have arisen

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since the time when the passages which Slesser L.J. has quoted from the first edition of Lush on Husband and Wife were current. To such a recent practice no regard can be paid.

In my view, it is not necessary in this appeal to consider the decisions in the cases of *Charlesworth* v. *Holt* (1) and *May* v. *May* (2), nor is it necessary to draw in advance any boundary line between pure separation agreements and deeds which in addition contain provisions making them post-nuptial settlements.

Eve J. The problem which we are called on to solve in this case is the true construction of a deed of separation entered into between the late Thomas Levitt Kirk of the one part and his wife Annie Mary Kirk of the other. [His Lordship referred to the terms of the deed and continued :] The parties never resumed cohabitation and on February 16 last the husband died, having by his will appointed the defendants to be his executors. This action was instituted by the widow for the purpose of recovering payment of the weekly sums accruing after her husband's death, or having it determined that she is entitled, notwithstanding her husband's death, to be paid the 2*l.* a week during the remainder of her life. In other words, she contends that according to the true construction of the deed and the language used the annuity is one payable weekly from the date of the deed for the rest of her life. The defendants, on the other hand, insist that the obligation to make the payment ceased on the husband's death.

The learned deputy county court judge decided that the contention of the widow was right and that the covenant to pay her the 2*l.* during her life remained for her benefit notwithstanding the death of her husband. Hence the appeal.

Turning now to the deed, its language is clear, simple, unambiguous and intelligible. No one can read it without appreciating that the payment of 2*l.* is to continue during the lifetime of the wife. It is so stated in the recital, in clause (*c*) of the husband's covenant, and in the wife's covenant.

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(1) L. R. 9 Ex. 38.

(2) [1929] 2 K. B. 386.

I cannot adopt the view that its language when properly considered shows any intention of basing the whole contract on the assumption of a basic condition which involves the necessity, if the contract is to operate, that both parties are living at any time when it is sought to enforce the deed and that they cannot properly be said to be living apart within the meaning of the agreement when one of them is dead.

In my opinion, the relations of Mr. and Mrs. Kirk were regulated so far as related to the only matter with which we have to deal—that is to say, Mrs. Kirk's right to a continuance of the annuity after her husband's death—by the terms of the document as construed by the learned county court judge. They are plainly stated in the deed and no case has been made out for disregarding those terms. In my opinion, the appeal ought to be dismissed.

Appeal allowed.

Solicitors: *F. Eustace & Co., London and Hull; A. E. Hamlin Brown & Co., for Pearlman & Rosen, Hull.*

H. L. L.

1936
May 26, 27.

COMMISSIONERS OF INLAND REVENUE *v.* THOMPSON.

Revenue—Income tax—Receiver for debenture holders of company—Liability to assessment—Person receiving or entitled to the income—Person succeeding to the trade of the company—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 9, *sub-r.* 2; *r.* 11; *Miscellaneous Rules, r.* 1; *General Rules applicable to All Schedules, rr.* 4, 5, 6, 15*—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 78, 264.

A company issued first debentures which provided that it charged with payment of the money thereby secured its undertaking and property, and that at any time after the principal money became payable the registered holder might with the concurrence of the holders of a majority in value of the debentures appoint a receiver of the property charged, who should have power to take possession of the property, to carry on or concur in carrying on the business of the company, to sell, and to make any arrangement or compromise. The company afterwards issued second debentures containing provisions similar to those above mentioned and further expressly providing that a receiver appointed thereunder should be deemed to be the agent of the company, which should be solely responsible for his acts, defaults, and remuneration, and that these debentures were constituted a floating security. The holders of the first debentures appointed a receiver, and the holders of the second debentures afterwards appointed the same person to be receiver on their behalf. The company, through the receiver, paid off the first debentures:—

Held, even if there was no succession by the receiver to the business of the company, that the receiver, whether under the first or the second debentures, was the person "receiving or entitled to the income" of the company's property and business within the meaning of the Income Tax Act, 1918, Sch. D, Miscellaneous Rules, r. 1, during his receivership and was therefore assessable to income tax in respect of that income during such period.

Inland Revenue Commissioners v. *Paterson* (1924) 9 Tax Cas. 163, distinguished.

Cox v. *Hickman* (1860) 8 H. L. C. 268; and *Gosling* v. *Gaskell* [1897] A. C. 575, observations explained and not applied.

Held, further, that there was no succession by the receiver to the business of the company within the contemplation of Sch. D, Rules applicable to Cases I. and II., *rr.* 9, 11, or at all.

CASE stated by the Commissioners for the special purposes of the Income Tax Acts.

John A. Wood, Ld., hereinafter referred to as "the company," was incorporated in 1896 with a capital of 30,500*l*., divided into 3050 shares of 10*l*. each. The capital was fully paid. The company carried on the business of upholstery cloth manufacturers in Manchester.

In 1896 the company created an issue of first debentures amounting to 10,000*l*. consisting of 20 debentures of 500*l*. each bearing interest at 4 per cent. per annum, payable half-yearly. Each of these debentures provided, by cl. 1, that the company agreed, as and when the principal moneys secured became payable, to pay to the registered holder the sum of 500*l*.; by cl. 3, that the company charged with payment its undertaking and all its property, present and future; and, by cl. 4, that the debentures were to be subject to the conditions therein, which were deemed to be part of it. The conditions provided, by cl. 2, that the principal moneys became payable (*a*) if the company made default in payment for a period of two calendar months of any interest thereby secured and the holder thereof before payment by notice in writing called in the principal moneys; by cl. 11, that at any time after the principal moneys secured became payable the registered holder might with the consent in writing of the majority appoint any person or persons to be a receiver or receivers of the property charged, and that the receiver or receivers so appointed should have power (1.) to take possession of the property charged by the debentures, (2.) to carry on or concur in carrying on the business of the company, (3.) to sell or concur in selling any of the property charged by the debentures, (4.) to make any arrangement or compromise which he or they should think expedient in the interest of the debenture holders.

On August 15, 1929, the company created an issue of second debentures amounting to 15,250*l*. of 25*l*. each, bearing interest at 5 per cent. per annum, payable half-yearly. These debentures provided, by cl. 3, that the company charged with the payments under the debentures its undertaking and all its property, including uncalled capital; by cl. 4, that the second debentures were issued subject to and with the benefit of the conditions endorsed thereon. The conditions provided,

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by cl. 1, that the debentures were to rank next after the issue of the 10,000*l.* first debentures; by cl. 2, that the debentures were constituted a floating security; by cl. 11, that the principal moneys secured became immediately payable (*b*) if the company made default for 30 days in payment of any interest and the debenture holder, before such interest was paid, by notice in writing to the company called in the principal money; by cl. 12, that the holder of the debenture might at any time after the principal moneys thereby secured became payable, with the concurrence of the holders of a majority in value of the debentures for the time being outstanding, appoint by writing a receiver and manager of the property thereby charged and might from time to time with the like concurrence remove any receiver and manager so appointed; by cl. 13 of the conditions, the receiver and manager had power (1.) to take possession of and get in the property thereby charged, (2.) to carry on or concur in carrying on the business of the company, (3.) to sell or concur in selling any of the property thereby charged, (4.) to make any arrangement or compromise which he should think expedient in the interests of the debenture holders; and that a receiver so appointed should be deemed to be the agent of the company and the company be solely responsible for his acts or defaults and for his remuneration. The provisions of the Law of Property Act, 1925, s. 101, sub-ss. 1 and 2; ss. 104, 106, 107; and s. 109, sub-ss. 3, 4, 6, 7 and 8, and the powers thereby conferred on a mortgagee or receiver were expressed, so far as applicable, to apply to the receiver so appointed as if such provisions were incorporated in the debentures, save that all moneys received by such receiver after providing for the matters specified in s. 109, sub-s. 8, cls. (i.) to (iii.), and for all costs, charges and expenses of or incidental to the exercise of any of the powers of such receiver should be applied in or towards satisfaction pari passu of the debentures.

In February, 1934, all the first debentures were held by one man, Mr. Leonard G. King. On February 27, 1934, by reason of non-payment of interest on the debentures, and after giving due notice of repayment to the company, he appointed the respondent, W. E. Thompson, of Manchester, chartered accountant, to be receiver of the premises charged by the debentures upon the terms and with and subject to the powers and provisions in the conditions endorsed on the said indentures contained.

The company, through the respondent, duly paid off the first debenture holder, and on July 29, 1935, the interest on the second debentures being unpaid and demand having been made for payment in accordance with the second debentures and default in payment having been made by the company, the second debenture holders appointed the respondent to be receiver and manager of the property charged by the second debentures upon the terms and with and subject to the powers and provisions in the conditions endorsed on the said second debentures contained.

At the date of the appointment of the respondent as receiver for the second debenture holders, there remained outstanding 513 second debentures of 25*l.* each, amounting to 12,825*l.*

As a result of its trading the company from September, 1932, to September, 1933, made a loss; from September, 1933, to February, 1934, made a loss; from February, 1934, to September, 1934, made a profit; and from September, 1934, to September, 1935, made a profit.

Since the appointment of the respondent as receiver the business of the company had been carried on in exactly the same manner, with his concurrence, as before his appointment. The trading had been carried on in the name of the company. All financial transactions had been passed through a banking account opened by the respondent and entitled "John A. Wood Limited, W. E. Thompson, receiver." The directors of the company, with the exception of the managing director, who ceased to hold that office on the appointment of the respondent, had carried on the business of the company under the supervision of the respondent. The stock-in-trade existing at the time of his appointment as receiver for the first debenture holders had been utilised and the organization of the company had continued as before. The debts due to the company at the time of his first appointment had been collected and the resulting cash utilized in the business. The debts incurred during his appointments had been paid, but the debts owing by the company at the time of his first appointment had not been paid. Save for the stock which had been utilized in the ordinary course of business and certain necessary alterations, repairs and additions, the assets of the company remained as they were before his appointment.

Assessments to income tax were made upon the respondent under Sch. D of the Income Tax Act, 1918, in the sums of 750*l.*, 10,000*l.*, and 3500*l.* for the years ending April 5, 1934, 1935 and 1936 respectively as receiver for the first debenture holder, and for the year ending April 5, 1936, as receiver for the second debenture holders. These assessments were in respect of the profits of the trade made during the period of the respondent's receivership.

On December 6, 1935, the respondent appealed against these assessments to the Special Commissioners.

It was contended on behalf of the respondent that these assessments had been wrongly made upon him.

It was contended on behalf of the Commissioners of Inland Revenue:

(1.) That under the terms of the first debentures the respondent on his appointment as receiver in February, 1934, became the agent of the first debenture holders.

(2.) That upon such appointment there was a succession to the said trade within the meaning of Sch. D, Rules applicable to Cases I. and II., r. 9, sub-r. 2; and r. 11.

(3.) That under the terms of the second debentures the respondent on his appointment as receiver in July, 1935, became the agent of the company.

(4.) That upon such last mentioned appointment there was a further succession to that trade within the meaning of r. 9, sub-r. 2; and r. 11.

(5.) That consequently the profits of the trade fell to be computed on the basis that two successions had taken place—namely, on February 27, 1934, and July 29, 1935, respectively.

(6.) That in any event, during his periods of receivership, the respondent, as receiver, was the person receiving or entitled to the profits of the said trade within the meaning of Miscellaneous Rules applicable to Sch. D, r. 1, and

That consequently the assessments were rightly made in the name of the respondent.

These contentions of the Commissioners of Inland Revenue were resisted on behalf of the respondent.

The Special Commissioners held that the legal ownership of the company's property did not pass to the respondent on either of his appointments, but remained vested in the company; and that on no occasion did he succeed to the company's trade; and they accordingly allowed his appeal and discharged the assessments.

Sir D. Somervell A.-G., *J. H. Stamp* and *R. P. Hills* for the appellants. The Special Commissioners were wrong in discharging the assessments to income tax upon the respondent as receiver for the debenture holders. The first question is whether, assuming that there was no succession by the respondent to the business of the company, the respondent as receiver for the debenture holders is assessable to tax. A receiver for debenture holders no doubt occupies a somewhat special position, but it does not follow that he is not assessable to income tax. He is sometimes appointed to be agent for the company and sometimes for the debenture holders. In *In re Vimbos, Ld.* (1), where the debentures were in the same form as those in the present case, it was held that the receiver was the agent of the debenture holders. But whether the receiver is appointed agent for the company or for the debenture holders, he is in neither case an ordinary agent, since he is not for many purposes under the control of his principal. Neither is he in the position of a trustee, because he has not the legal estate in the property. The statutory provision most nearly applicable to a receiver in respect of liability to income tax would seem to be Income Tax Act, 1918, Sch. D, Miscellaneous Rules, r. 1, which provides:

(1) [1900] 1 Ch. 470.

"Tax under this Schedule shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this Schedule is hereinbefore directed to be charged." It is submitted that a receiver for debenture holders is a person "receiving or entitled to" the income of the property of which he is appointed receiver within the meaning of that rule. Various classes of persons having limited interests in property may come under the second branch of that rule as being "entitled to" the income. A trustee as such is entitled to the trust estate and the income thereof at law, a beneficiary as such is entitled thereto in equity, and a debenture holder is entitled to so much of the borrower's assets and the income thereof as will satisfy his debt and interest. But a receiver alone is a person both receiving and entitled to the property and income which he is appointed to take, and when he is appointed on behalf of debenture holders he is therefore the proper person to assess to income tax in respect of so much of the income of the company's property as he obtains and applies in payment of the debenture interest. The provision in All Schedules Rules, r. 15, that a receiver appointed by any Court which has the control of any property in respect of which tax is charged shall be assessable in like manner as if the property were not under the control of the Court, clearly implies that a receiver not appointed by the Court is as a matter of course assessable to tax. Under the Companies Act, 1929, ss. 78 and 264, a receiver for debenture holders is liable to pay the rates and taxes including income tax which become due before his appointment. The Act, certainly, does not go on to provide in express terms that the receiver is to pay the income tax which becomes due after his appointment, but it must be taken to assume that the receiver would be liable for that income tax, since the contrary view would impute to the Legislature the inconsistency of making the insolvent company liable for the tax upon the income of a business which it no longer carries on or even controls. The three tests of liability to income tax in respect of the income of property are the ownership of the property, the control and management of the property, or some beneficial interest in the income of the property. Of these tests the intermediate one applies to the receiver who has complete control over the property and business of the company.

Secondly, the liability to income tax of the respondent as receiver does not depend upon there having been a succession by him to the business of the company. The revenue authorities have hitherto taken the view that a receiver who is appointed agent for the company has not the succession to the business. Little assistance is to be derived from the Acts as to what constitutes a succession.

Roland Burrows K.C. and *J. Alan Bell* for the respondent. The decision of the Special Commissioners discharging the assessments upon the respondent should be affirmed and the appeal dismissed. These Commissioners rightly held that the legal ownership of the company's property did not pass to the respondent on either of his appointments as receiver. Where a receiver of property is appointed it is in general the owner of the property who is assessable to income tax. In certain cases, however, he may be assessed in the name of the receiver. Thus, under the All Schedules Rules, rr. 4, 5 and 6, a person not resident in the United Kingdom shall be assessable in respect of any profits or gains in the name of (inter alia) any receiver; and under the Companies Act, 1929, ss. 78 and 264, a receiver for the debenture holders of a company must first pay the debts of the company which are payable in priority including assessed taxes in preference to any claim in respect of the debentures, although he receives the money as representing the debenture holders. A receiver for debenture holders is not a person " receiving or entitled to " the income of the company's property or business within the meaning of Sch. D, Miscellaneous Rules, r. 1. The income of the company's business remained the income of the company notwithstanding the appointment of the respondent as receiver. In *Inland Revenue Commissioners* v. *Paterson* (1), where a wife, to assist her husband, obtained a loan from an insurance company and applied it in the purchase of shares which she gave to the company as security for the loan, it was held that the dividends on the shares were income of the wife, the debtor, and not of the insurers, the creditors. Similarly, here, the profits of the company's business are income of the company, the debtor, and not of the debenture holders, the creditors. A receiver for debenture holders in possession of a company's property does not receive the income thereof but only certain moneys arising therefrom. In the present case the second debenture incorporated certain sections of the Law of Property Act, 1925, including s. 109, which empowers the receiver to demand and recover all the income "of which he is appointed receiver." The respondent, as receiver, was not in possession of the income of the company's business. It was not his duty to set off the profits against the losses of that business and take possession of any resulting balance of profit. The money applied in payment of the debenture holders is not income of the company. It was either money deducted from the income of the company or money intended to be paid to the company but appropriated before reaching the company. In order to determine whose income the respondent was obtaining, the material consideration is not for whose benefit the money is being applied, but who is entitled to it as profit and gain. The respondent, as receiver, did not carry on the business of the company. The relevant facts stated in the case amount to a definite finding that after the appointment of the respondent as receiver the company continued to carry on its business in the same manner as before his appointment. The respondent, as receiver, may have concurred in and to some extent supervised the business, but he did not oust the company from its position as the real controller of the business. The respondent, as receiver for the debenture holders, is only the agent of the company in the management and control of the business which continues to be that of the company itself. The mere concurrence of the company in an arrangement under which it permitted the respondent on behalf of the debenture holders to carry on the business did not make either the respondent or the debenture holders partners with the company in the management of the business: see per Lord Halsbury L.C. in *Gosling* v. *Gaskell* (1) quoting with approval the statement of Lord Cranworth in *Cox* v. *Hickman* (2); still less did it make them independent managers of the business. The power of the receiver is limited to taking so much of the capital or income of the company as may suffice to satisfy the claims of the debenture holders without resort to litigation.

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(1) 9 Tax Cas. 163.

Secondly, the Special Commissioners rightly held that on neither appointment of the respondent, as receiver, was there a succession by him to the company's business.

J. H. Stamp in reply. The All Schedules Rules, rr. 4, 5 and 6, do not support the case of the respondents. On the contrary they show that a receiver is properly assessable to tax, and that he may be assessable even in a case in which he has not the actual receipt of the profits which are the subject of taxation. Where the receiver takes possession of the company's property and proceeds to carry on its business in the interests of the debenture holders he occupies an intermediate position between the company and the debenture holders and is the only assessable person. It would be useless to attempt to assess the company from whom the possession of the property has passed to the receiver, or the debenture holders who have never acquired the possession of the property and must look to the receiver for payment. The cases cited on behalf of the respondent do not apply to such a case at this.

LAWRENCE J. In this case the assessments were made upon the respondent, who was the receiver of a company called John A. Wood, Ld., and the Special Commissioners have discharged those assessments because they held, first, that the legal ownership of the company's property did not pass to the respondent on the occasion of either of his appointments, he having been appointed in the first instance as receiver for the first debenture holders and in the second instance as receiver on behalf of the second debenture holders, but that the company's property remained vested in the company; and, secondly, that on neither occasion did the

(1) [1897] A. C. 575, 580.

(2) 8 H. L. C. 268.

respondent succeed to the company's trade; and they accordingly discharged the assessments.

The case has been argued before me on two points: first, whether the assessments were properly made upon the receiver as being the person who received the income within the meaning of Miscellaneous Rules to Sch. D, r. 1; secondly, whether the receiver ought to be assessed on the footing of being the person who had succeeded, either on his appointment as receiver for the first debenture holders or on his appointment as receiver for the second debenture holders, to the trade of the company. In the course of the argument it was conceded that possibly the question whether there had been a succession might be a question of fact, and that it would be difficult to argue that there was not evidence for the Commissioners to find that there had been no succession in this case. I will consider that aspect of the matter when I come to deal with the question whether or not there has been a succession.

The first question is whether the receiver was the right person to assess, upon which the Special Commissioners have decided, against the Crown's contention, that he was not the right person to assess. That question turns primarily upon r. 1 of the Miscellaneous Rules applicable to Sch. D, which is in these terms: "Tax under this Schedule shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this Schedule is hereinbefore directed to be charged." The receiver in this case was appointed under debentures which were in substantially the same terms as the debenture in the case of *In re Vimbos, Ld.* (1), where it was held that a receiver appointed under such a debenture as that was an agent for the debenture holders and not an agent for the company. Under that debenture the powers of the receiver were, first, to take possession of the property charged by the debentures; secondly, to carry on, or concur in carrying on, the business of the company; thirdly, to sell, or concur in selling, any of the property charged by the debentures; and, fourthly, to make any arrangement or compromise which they or

(1) [1900] 1 Ch. 470.

he shall think expedient in the interest of the debenture holders.

It has been contended by Mr. Burrows on behalf of the respondent that the receiver appointed with those powers, having regard to the findings of the Commissioners as to the carrying on of the business, was not a person " receiving " the income of the company within the meaning of Miscellaneous Rules, r. 1. In my judgment, that contention is unsound. It appears to me that the receiver, who has power to take possession of the property and who does take possession of the property and who carries on or concurs in carrying on the business of the company, as the respondent did, must receive the income of the company. I was referred by Mr. Stamp, on behalf of the Crown, to the Companies Act, 1929, ss. 78 and 264, which imposed upon receivers the duty of paying out of assets coming to their hands in priority to any claim for principal or interest in respect of debentures all parochial or other local rates and all assessed taxes up to April 5 next before the time when the receiver is appointed, and not exceeding in the whole one year's assessment. Those sections contemplate that a receiver appointed on behalf of the holders of the debentures of a company secured by a floating charge does in fact have coming into his hands the assets of the company, and that he is the person to pay any tax incurred by April 5 next before his appointment. Those sections are important in my view as showing, first, that the receiver is the person to pay that income tax and, therefore, presumably, the person who would be liable to pay income tax thereafter so long as he remained in his position as receiver ; and, secondly, as recognizing that all the assets of the company do come to his hands. In my judgment the words " receiving " income in Miscellaneous Rules, r. 1, mean receiving in fact the income.

Mr. Burrows's argument, so far as I understood it, also involved the contention that " income " in that rule meant the balance of profits and gains ; that the receiver in receiving the money of the company as it came in from time to time was not receiving the balance of profits and gains ; and that therefore he was not the person who received the income

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within the meaning of that rule. There appears to me to be no force in that contention. The receiver in fact receives the proceeds of all the assets of the company, whether they are capital or income, and in receiving the proceeds of assets which are income assets he receives the income within the meaning of that rule. My attention was drawn by Mr. Stamp to r. 15 of the General Rules applicable to All Schedules, which provides expressly that: " A receiver appointed by " the Court " shall be assessable and chargeable with tax in like manner and to the like amount as would be assessed and charged if the property were not under the direction and control of the Court." That rule appears to me to contemplate that a receiver other than a receiver appointed by the Court would be assessed and charged in the ordinary course, being the person who received the income under Miscellaneous Rules, r. 1, and r. 15 is introduced for the purpose of providing that a receiver appointed by the Court shall be assessed and charged in the same way, although being under the direction and control of the Court he might be said not to be in receipt of the income. My attention was also drawn to the fact that the receiver is the occupier for the purpose of rating, and that on his appointment there is a change of occupation, and the case of *Richards* v. *Overseers of Kidderminster* (1) was referred to.

On behalf of the respondent it was further contended that rr. 4, 5 and 6 of the General Rules supported the argument of the respondent, but in my judgment, on the contrary, they operate in favour of the Crown's contention, and particularly, it seems to me, r. 5, which provides that a person not resident in the United Kingdom shall be assessable and chargeable in the name of his factor, agent, receiver or manager, whether such receiver has the receipt of the profits or gains or not. That rule appears to me to be perfectly consistent with the view put forward by the Crown that the receiver in the ordinary course is the person who receives within the meaning of Miscellaneous Rules, r. 1, but the assessment is to be made upon a receiver for a person not

(1) [1896] 2 Ch. 212.

resident in the United Kingdom although he does not fall within Miscellaneous Rules, r. 1.

Mr. Burrows referred me to the case of *Inland Revenue Commissioners* v. *Paterson* (1), but that case appears to me not to assist his argument. It was not a decision that the insurance company did not receive the income of the debtor; it was simply a decision that notwithstanding the fact that the insurance company received the income of the debtor it did not cease to be her income because it was applied by her in part in discharge of her debt, which was part of the capital of the insurance company—a repayment of the capital which she owed to the insurance company. My attention was also drawn by Mr. Burrows to the case of *Gosling* v. *Gaskell* (2), and particularly to a quotation by Lord Halsbury (3) from the judgment of Lord Cranworth in the case of *Cox* v. *Hickman* (4), where he said: " It seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors, though their consent is necessary in such a case, for without it all the property might be seized by them in execution; but the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on." What Lord Cranworth was there dealing with was the ultimate beneficial interest in the profits, and he was not considering the question whether the person who actually received the income in the first instance was or was not the receiver, and that is clear from his use of the words, where he says that the debtor " receives the benefit of profits as they

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(1) 9 Tax Cas. 163.
(2) [1897] A. C. 575.
(3) [1897] A. C. 580, 581.
(4) 8 H. L. C. 268.

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accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts." That is not to say that somebody else has not actually received the profits themselves.

For these reasons, I am of opinion that the receiver in this case was a person who might be assessed under Miscellaneous Rules, r. 1.

As to the question whether there has been a succession on the appointment of a receiver, I am not clear that that is a question of fact, and in my view there has been no succession in this case either on the appointment of the receiver as receiver for the first debenture holders or on the appointment of the receiver as receiver for the second debenture holders. It appears to me that the rule which indicates most clearly what a succession means within the meaning of the Income Tax Act, 1918, is r. 9 applicable to Cases I. and II. of Sch. D. That rule, in my opinion, contemplates that there must be a cessation of the trade which has been carried on and that somebody else must then succeed to that trade, and in my opinion the circumstances in which a receiver is appointed with power to carry on trade primarily in the interests of debenture holders but ultimately in the interests of the company whose trade it is does not constitute the cessation of the carrying on of the trade and the succession which is contemplated in r. 9. In my opinion, therefore, there is no succession in a case where a receiver is appointed in terms similar to the appointment of the receiver in this case either for the first debenture holders or for the second debenture holders. The case, I understand, will have to go back to the Commissioners for the purpose of assessment. In view of the fact that in my opinion there has been no succession, I think I ought to make no order as to costs.

Appeal allowed.

Solicitor for appellants: *The Solicitor of Inland Revenue.*
Solicitors for respondent: *Hall, Brydon & Chapman.*

J. R.

THE KING *v.* GOVERNOR OF BRIXTON PRISON.

Ex parte BIDWELL.

1936
Aug. 13.

Fugitive offender—Warrant for apprehension—Arrest and imprisonment of accused—Application for habeas corpus—Grounds for—Alleged insufficiency of indorsement of warrant by magistrate only and not by Secretary of State also—Alleged absence of evidence raising "strong or probable presumption" against accused—Fugitive Offenders Act, 1881 (44 *&* 45 *Vict. c.* 69), *ss.* 3, 5, 9.

The Fugitive Offenders Act, 1881, s. 3, provides that: "Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part . . . . in or on the way to which the fugitive is or is suspected to be: that is to say (1.) A judge of a superior court in such part; and (2.) In the United Kingdom a Secretary of State and one of the magistrates of the metropolitan police court in Bow Street; and (3.) In a British possession the governor of that possession, ... may indorse such warrant. . . . .":—

Held, that in category (2.) of the authorities who may indorse the warrant the word "and" is used disjunctively, and that a warrant issued in a part of the Sovereign's dominions for the apprehension of a suspected fugitive from that part may be indorsed in the United Kingdom by a magistrate of the said police court alone, and need not be indorsed both by a magistrate and a Secretary of State.

The Fugitive Offenders Act, 1881, s. 5, provides: "A fugitive when apprehended shall be brought before a magistrate. . . . . If . . . . such evidence is produced as . . . . raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant . . . . the magistrate shall commit the fugitive to prison to await his return."

Held, that in requiring, as a condition of committing an alleged fugitive, such evidence as raises "a strong or probable presumption" that he committed the offence, the section means such evidence as, if it remained uncontradicted at the trial, would entitle a reasonable jury to convict the alleged fugitive upon it.

Where, in proceedings under this section a magistrate has found that the evidence produced before him raises a strong or probable presumption that the alleged fugitive is guilty of the offence and has committed him, and the alleged fugitive has obtained an order nisi for a habeas corpus, *Quaere,* whether on the argument of the order nisi it is open to the High Court to consider whether the evidence produced before the magistrate is sufficient to raise a strong or probable presumption of the guilt of the alleged fugitive.

Rex v. *Vyner* (1903) 68 J. P. 142 considered and observations adopted.

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REX
v.
GOVERNOR
OF
BRIXTON
PRISON.

BIDWELL,
Ex parte.

ORDER NISI for a writ of habeas corpus.

Mervyn Wolford Bidwell (hereinafter called " the accused ") was charged on the information of Miss Edna Porte, hereinafter called " the informant," at Toronto, Canada, with having unlawfully obtained from her there in 1931 a number of valuable securities by false pretences with intent to defraud, and was also charged on her information with having unlawfully stolen from her certain valuable securities.

The informant in her deposition stated that in January, 1931, the accused told her that if she would put money into an undertaking for the shipment of cocoanut oil she would receive 10 per cent. weekly on her principal, which would be returned to her at any time without notice; that during 1931 she gave him twelve cheques for amounts to be invested in that undertaking; that on receiving each of these cheques the accused gave her a cheque drawn by himself to be cashed at any time, but relying on his representations as to his successful business ventures she presented only one of these for payment some nine months after its date, when she was told that his account was closed, and some of them she had mislaid or lost; that in the same year she gave the accused a $1000 bond to be invested in that undertaking, but neither that bond nor its value was ever returned to her; that the amounts of her cheques and that bond totalled upwards of $3900; that till August, 1931, she got interest at 10 per cent. weekly on these amounts, but after that date only on the bond, till 1932, when that also ceased; that during the same period, relying on the representations of the accused, she handed over to him certain stocks and shares on condition that they were to be exchanged for stocks or shares in certain other concerns, one of which was a projected Colonial railway, but that she had never received any of these other stocks or shares, nor had her own stocks and shares been returned to her; that she never gave permission for the sale of her securities; that in July, 1932, the accused suddenly disappeared; and that the total value of the cheques and bond given by her to the accused was $3900, and of the stocks and shares so given $20,000.

In 1932 a warrant was issued in Canada for the apprehension of the accused, and was afterwards indorsed by a magistrate of the metropolitan police court.

On May 18, 1936, the accused was arrested at Southampton, England, on that warrant, and was taken to the metropolitan police station at Cannon Row and there charged with these offences.

On July 7 and 15, pursuant to the Fugitive Offenders Act, 1881, the accused was brought before the chief magistrate of the Metropolis at Bow Street Police Court, who heard, in manner provided by s. 5 of the Act (1), the application to commit the accused to prison to await his return to Canada. The magistrate heard the oral evidence, perused the depositions, heard a lengthy statement by the accused, and decided to commit him to be sent back to Canada; and at the same time explained to him that he had a right to apply to the High Court for a writ of habeas corpus. The accused was thereupon detained in H.M. prison at Brixton in the county of London.

The accused in his above mentioned statement said, in substance, that there was no evidence against him of false pretences; that the informant had given no proof that he had had her securities; that she said that she gave her securities to him to be exchanged for other securities as a result of his statements regarding dividends paid on these latter securities without saying what dividends, and that she gave no evidence that the moneys received from her securities were not actually reinvested; that she had consented to the sale of her securities by signing transfers of them; that she admitted she had received 10 per cent. a week on the amount of all her cheques till August, 1931, and on the $1000 bond till 1932; that three of the stocks given to her were redeemable on dates in 1931 and that she could not have forgotten these investments and failed to collect the money on them until after he had left the country a year later; that the informant had actually received from the accused in interest payments, and the above three stocks only, over $15,000, while all the cheques and securities given by her to him were worth only $14,504; that it was understood that the cheques which he gave her were mere memoranda of transactions between them; that, as to the shares in the Colonial railway, the concessions for that railway had been rendered valueless by a hurricane amounting to an act of God; that the informant had received from him more money than she had ever invested excepting that lost in the Colonial railway; that her proceeding had been taken through malice and not through actual loss; and that the charge should be dismissed.

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(1) The section of the Act, so far as material, is set out in the headnote.

On July 29, 1936, the accused made an application to the High Court through the official solicitor and counsel for an order nisi calling upon the Governor of Brixton Prison to show cause why a writ of habeas corpus should not issue to him to have the accused before the High Court on the grounds: (1.) that the order of committal was decided upon before hearing any statement by the accused; (2.) that the warrant was not indorsed by a Secretary of State; and (3.) that the evidence did not disclose a strong or probable case that the accused was guilty.

In his affidavit in support of the application the accused said that on July 15, 1936, the magistrate announced his decision to commit the accused before he was given an opportunity to make a statement on his own behalf and thereby acted in contravention of the Criminal Justice Act, 1925, s. 12, sub-s. 8, and the Fugitive Offenders Act, 1881, s. 5 (1); that after the magistrate had announced his decision the accused was allowed to make a statement, whereupon the magistrate repeated his decision to commit the accused; and that the evidence did not raise a strong or probable presumption that the accused committed the alleged offences or either of them, and was not sufficient to justify his committal.

The High Court made an order nisi in the terms of that applied for.

On August 13, 1936, the order nisi came before the High

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(1) The section, so far as material, is set out in the headnote.

Court for argument, when an affidavit by the chief clerk of the Bow Street Police Court was read in which he stated (inter alia) that he was present at the hearing of the charge against the accused on July 15, 1936; that the chief magistrate did not announce his decision before the accused was given an opportunity to make his statement; and further that s. 3 of the Act of 1881 had during all deponent's term of office been interpreted by the magistrates at Bow Street Police Court to mean that indorsement of the warrant by one of themselves was sufficient, and that to the best of his belief that had always been the practice.

Eustace Fulton showed cause. The order nisi for a writ of habeas corpus to bring up the accused should not be made absolute on any of the grounds stated therein.

First, the allegation that at the police court the order of committal was decided upon before the statement of the accused had been heard is not borne out by the evidence.

Secondly, the warrant for the apprehension of the accused did not require to be indorsed by a Secretary of State as well as by the magistrate. The Act of 1881, s. 3 (1), provides that where a warrant has been issued in one part of the dominions of the Crown for the apprehension of a fugitive from that part, any of certain specified authorities in another part may indorse the warrant, category (2.) of these authorities, which applies to the United Kingdom, being "a Secretary of State and one of the magistrates of the metropolitan police court in Bow Street." In that category of authorities the word "and" is used not conjunctively but disjunctively, so that the words mean not that the warrant must be signed by both a Secretary of State and a magistrate, but by either a Secretary of State or a magistrate. It cannot be supposed that a warrant indorsed by a Secretary of State alone would not be effective unless it was indorsed by a magistrate also. These authorities are alternative and not conjoint. The warrant indorsed by the magistrate was valid and effective.

Thirdly, the allegation that the evidence did not disclose a

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(1) The section, so far as material, is set out in the headnote.

"strong or probable presumption" that the accused was guilty within the meaning of the Act of 1881, s. 5 (1), is not correct. A consideration of the informant's information and of the accused's attempted answer to it in his statement is sufficient to disclose a strong presumption of his guilt. In *Reg.* v. *Maurer* (2), where a habeas corpus was applied for in the case of a person committed by a magistrate under the Extradition Act, 1870, it was held that the question of the sufficiency of the evidence was for the magistrate, and that this Court had no jurisdiction to review his decision on the ground that it was against the weight of the evidence. That ruling should be followed in the present case. In *Rex* v. *Vyner* (3), a case similar to the present, it was contended that the question whether the evidence disclosed a strong or probable presumption under s. 5 of the Act of 1881 could be considered by this Court on an application for a habeas corpus, but the Court declined so to hold, and left the point open.

P. M. Wright for the accused, in support of the order nisi. The order nisi should be made absolute on any of the grounds stated therein.

As to the first ground, it would seem that at the police court the accused was not at first given an opportunity of making his statement, and that it was only after he had said that he wished to make it that he was allowed to do so.

Secondly, the warrant for the apprehension of the accused should have been indorsed by both a Secretary of State and a magistrate. On the true construction of s. 3 of the Act of 1881 (1) the word "and" in the second category of authorities is used conjunctively and not disjunctively, and that clause means that the warrant must be indorsed by both these authorities acting together. The section provides that any of "the following authorities" may indorse the warrant, and proceeds to specify and enumerate these authorities, all of whom are presumably of equal importance, two of them being individuals—namely, (1.) a judge of a superior Court, and (3.) the Governor of a British possession, and the other

(1) The sections, so far as material, are set out in the headnote.

(2) (1883) 10 Q. B. D. 513.

(3) 68 J. P. 142.

a combination of two individuals—namely, (2.) a Secretary of State and a metropolitan magistrate. In categories (1.) and (3.) the authority is of higher status than a police magistrate, and it is not to be supposed that in the United Kingdom the authority should be only of the status of a magistrate. It is true that s. 26 provides that an indorsement shall remain in force notwithstanding that the " person " indorsing it dies or ceases to hold office, but that term may include either one individual or several individuals, and it is equally applicable to each of the three authorities specified. Sect. 2 of the Act provides that a fugitive may be apprehended under an indorsed warrant or a provisional warrant. By s. 5, where a magistrate has committed a fugitive pursuant to an indorsed warrant he shall forthwith send a certificate of the committal and a report of the case to a Secretary of State, and by s. 4, where a magistrate has issued a provisional warrant he shall forthwith send a report of the issue together with the information to a Secretary of State; and these provisions show that the co-operation of both these authorities is necessary to render an indorsed warrant effective. The practice at Bow Street Police Court, according to which the warrant is indorsed by a magistrate only, may be based on an erroneous view of s. 3. As the Act of 1881 is a penal enactment, any question as to the meaning of one of its provisions should be resolved in favour of the accused: see per Wright J. in *London County Council* v. *Aylesbury Dairy Co.* (1)

Thirdly, the evidence did not disclose a " strong or probable presumption " that the accused was guilty within the meaning of s. 5. (2) In order that this Court may be in a position to decide whether to issue a writ of habeas corpus to bring up the accused, it is necessary that it should inquire into the validity of his commitment, and to enable it to do so it must have power to consider whether there was evidence before the magistrate disclosing a presumption that the accused has been guilty of the offence with which he is charged: *Rex* v. *Governor of Brixton Prison. Ex parte Percival.* (3) Here there was no evidence before the magistrate disclosing a presumption that the accused committed either of the offences charged. As to the first charge, that of his having obtained securities from the informant by false pretences with intent to defraud, the evidence as a whole does not disclose that there was on the part of the accused any false pretence or intent to defraud; and as to the second charge of stealing securities from the informant the evidence is not inconsistent with the view that he may have disposed of these securities in good faith for her benefit, or that she received value for all her securities.

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(1) [1898] 1 Q. B. 106.

(2) The section, so far as material, is set out in the headnote.

(3) [1907] 1 Q. B. 696.

SWIFT J. In the year 1931 M. W. Bidwell was accused in Toronto, Canada, of having unlawfully obtained from a Miss Edna Porte a number of valuable securities by false pretences with intent to defraud, and he was also accused of stealing a number of valuable securities. The result was that in 1932 warrants were issued in Canada for his arrest. He was not found there to answer the charges, but in May, 1936, the warrant having been indorsed by a magistrate of the Bow Street Police Court, he was arrested in this country and eventually brought before the chief magistrate of the Metropolis at that police court to be dealt with under the Fugitive Offenders Act, 1881. [His Lordship stated, substantially as above set out, the facts relating to the proceedings at the police court and the committal of the accused to await his return to Canada, subject to his right to apply to the High Court for a writ of habeas corpus, and continued as follows:] The accused decided to apply to this Court for a writ of habeas corpus through the official solicitor and counsel, both of whom are supplied to the alleged fugitive by this country for his assistance and in order that this Court may ascertain, before he is sent back, that everything has been done properly and in order. He accordingly made an application to this Court for, and succeeded in obtaining, an order nisi for a writ of habeas corpus on three grounds.

The first of these grounds is that the order of committal was decided upon before the hearing of any statement by the accused. After having considered the evidence on both sides and all the circumstances I cannot think that there is the slightest ground for supposing that the chief magistrate did not observe the ordinary procedure and daily practice in the courts in regard to this matter. In my view there is no foundation in fact for the statement of the accused that the committal was decided upon before his statement was heard.

The second ground is one of a highly technical character, though none the less effective if valid, based upon the wording of s. 3 of the Act of 1881. (1) It is contended on behalf of the accused that the warrant for his apprehension should have been indorsed not only by one of the magistrates of Bow Street Police Court, but also by a Secretary of State. That contention, as I understand it, is based entirely upon the word "and" which occurs in the second category of the authorities who are empowered to indorse warrants by s. 3 of the Act of 1881. (1) [His Lordship read the section and continued:] In order to support the contention of the accused Mr. Wright was forced to argue that in the United Kingdom neither a Secretary of State nor a magistrate was by himself an authority to indorse a warrant, but that the two must be combined for the purpose of constituting an authority. I do not accept that contention. It seems to me that the section means that the authorities, any one of whom may indorse the warrant, are to be, in any part of the Dominions in which an alleged fugitive may be found, a judge of a superior Court in that part; in the United Kingdom a Secretary of State and one of the magistrates of Bow Street Police Court; and in a British possession the Governor of that possession. The section is giving a list of the authorities, and it seems to me that for the purposes of the section a magistrate is as much an authority as a judge, a Secretary of State, or the Governor of a possession. I think that the contention of the accused to the contrary is erroneous, and, therefore, that the second ground for an order absolute also fails.

As to the third ground, it is said that before the magistrate can commit an alleged fugitive under s. 5 of the Act of

(1) The section, so far as material, is set out in the headnote.

1881 (1) the evidence produced must raise a strong or probable presumption that he is guilty of the offence mentioned in the warrant, and that here the evidence did not disclose a strong or probable presumption that the accused was guilty of the offence with which he is charged. The language of s. 5 (1), however, was not new in 1881, but is the same as that on which our courts have been accustomed to act when committing persons for trial, at any rate since the passing of s. 25 of the Indictable Offences Act, 1848. The section means that there must be such evidence that, if it be uncontradicted at the trial, a reasonably minded jury may convict upon it. If it is contradicted at the trial and the jury believe the contradiction, then, of course, they will not convict. The magistrate, however, is not trying the case, but is only considering whether there is such evidence that the accused ought to be sent to take his trial before a jury or some other tribunal in the place where the allegations are made against him. Whether or not there is in any particular case a strong or probable presumption that the accused is guilty must be a question for the magistrate. But it has been argued in this Court before to-day, and again to-day, that it is for this Court to decide whether there is such a strong or probable case. As to that contention, in *Rex* v. *Vyner* (2) Lord Alverstone C.J. said: "For the purpose of this case I am going to assume that this Court can consider whether there was in the evidence before the magistrate such a strong or probable presumption. The question may arise on some future occasion as to whether this Court has such a power to review the exercise of the magistrate's discretion. Speaking for myself, I think the Court has such a power to review though it is not now necessary to decide the point, as assuming that the Court has such a power, after the most careful consideration of all the facts in this case, I am of opinion that there is a grave case to be answered by Lieutenant Vyner." (3) In the same case Kennedy J. said: "I also think the question as to the power of the Court to try whether there was or

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(1) The section, so far as material, is set out in the headnote.

(2) 68 J. P. 142.

(3) Ibid. 143.

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was not a strong or probable presumption of the prisoner having committed the offence, should be left open, as, speaking for myself, I should be very slow to interfere with the discretion of a magistrate who has come to a decision with the facts before him." (1) I do not want to say anything which may lead anybody to suppose that this Court to-day solves the problem which the judges in that Court left unsolved. I agree with Lord Alverstone in thinking that the question is open to this Court. I have been much impressed by the argument of Mr. Wright to that effect, but it is not necessary to decide the point now, because here, as in *Rex* v. *Vyner* (2), there is, in my view, a very grave case for the accused to answer. There is a strong or probable presumption that he is guilty. He is not being tried here either by the magistrate or by this Court. When he gets back to Canada he may be able to satisfy the tribunal which has to deal with his case that he is perfectly innocent of the charges made against him. Whether he will succeed in doing so I do not know, but on the material before us it seems to me that the magistrate was right in the conclusion to which he came, and that this order nisi should be discharged.

BRANSON J. I agree and have nothing to add.

MACKINNON J. I agree.

Order nisi discharged.

Solicitor for the respondent: *The Director of Public Prosecutions.*

Solicitor for the applicant: *The Official Solicitor.*

J. R.

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(1) 68 J. P. 143.

(2) Ibid. 142.

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COLE v. POLICE CONSTABLE 443A.

Ecclesiastical law—Church—Collegiate church—Royal Peculiar—Westminster Abbey—Dean, powers of—Right to exclude member of public—Non parishioner—Right to attend parish church.

Under letters patent from the Crown and statutes pursuant thereto Westminster Abbey is made a Royal Peculiar the government of which belongs to the dean. The appellant was a professional guide for sightseers, and, after a special permit to him to act as a guide to the Abbey had elapsed, the dean made an order that he was to be excluded therefrom. On a subsequent day, which was neither a Sunday nor a holy day, the appellant was in the Abbey during divine service wearing his ordinary guide's badge, when the respondent, a police constable, after having requested him to leave, ejected him without unnecessary violence. The appellant laid an information in the police court against the respondent for having unlawfully assaulted him. The appellant made no claim to be a parishioner of the Abbey, and could produce no evidence of permission having been given to him to be there, but it was found that there had been no misconduct by him on the day of his ejection. The magistrate dismissed the information. On a case stated which set out these facts:—

Held, that the dean had authority to make the order excluding the appellant; that on the appellant's refusal to leave when requested the respondent was justified in ejecting him; and, therefore, that the magistrate had rightly dismissed the information.

Semble, that a person who is not a parishioner has no legal right to attend a parish church even on Sundays or holy days, but if he is prevented from attending his own parish church on such days, he may present himself for admission to some other church where service is usually held.

CASE stated by a Metropolitan police magistrate.

Before the date next hereinafter mentioned the Dean and Chapter of Westminster Abbey granted to Henry John Cole, hereinafter called " the appellant," a permit to act as a guide in the Abbey.

In March, 1932, that permit expired.

The appellant applied for a renewal of the permit, but the application was refused.

Later the Dean of Westminster gave instructions that the appellant was to be excluded from the Abbey.

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On December 12, 1935, [1] the appellant was in the Abbey during divine service and was wearing a badge bearing the words "Cole's Sightseeing Tours Guide," when police constables 149A and 443A ejected him without unnecessary violence after having requested him to leave.

There was no misconduct by the appellant on that day prior to his ejectment.

Letters patent dated May 21, 1560, granted by Queen Elizabeth, to the dean and chapter of Westminster Abbey contained (inter alia) the following provisions: "We will and ordain that the sd. scite and church may be and henceforth for ever shall be a collegiate church. The dean and chapter shall be one body corporate with power to prosecute claim plead, to receive and purchase manors and to have a common seal. We have given and granted to the aforesaid dean and chapter all our church of the late monastery of St. Peter now dissolved and all the scite circuit, compass, and precinct of the said late convent or monastery with all ancient privileges liberties and free customs."

On December 13, 1935, at the police court at Bow Street, an information was preferred by the appellant, under the common law and under s. 42 of the Offences Against the Person Act, 1861, against police constable 443A, hereinafter called "the respondent," for that he on December 12, 1935, did unlawfully assault the appellant.

On January 18, 1936, the information was heard by the magistrate, when the above mentioned facts were proved.

On the part of the appellant it was contended that the Abbey is a public church licensed for the public celebration of holy matrimony and baptism and open for public service, that the dean had no authority to make an order excluding him from the Abbey, and that therefore the constables were guilty of an assault in ejecting him.

On the part of the respondent it was contended: (*a*) that under the letters patent granted by Queen Elizabeth in 1560, the Abbey was handed over to the Dean and Chapter with all its ancient privileges, and that the Dean and Chapter

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[1] That day was neither a Sunday nor a holy day.

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were appointed, under the Queen, to control the Abbey, (*b*) that by virtue of these ancient privileges not only was the Abbey subject neither to archiepiscopal nor episcopal control, but that to the dean " belongs the government of the whole college and all its parts," (*c*) and that therefore the constables were justified in ejecting the appellant as in so doing they were carrying out the lawful orders of the dean.

The magistrate formed the opinion that under the authorities quoted the Dean and Chapter acted within their powers in excluding the appellant, and he accordingly dismissed the information.

On May 13, 1936, on the application of the respondent, the Divisional Court made an order that the case stated be remitted to the magistrate for re-statement with directions that the magistrate should state where the words " belongs the government of the whole college and all its parts " quoted in the paragraph containing the respondent's contentions came from ; and that he should inform the Court of the authorities quoted to him.

In pursuance of that order the case stated was remitted to the magistrate and he added to it the two following paragraphs, which were inserted between the paragraph containing the respondent's contentions and the paragraph containing the decision of the magistrate :—

" I understood that the words ' belongs the government of the whole college and all its parts ' were extracted from the letters patent aforementioned, but on further inquiry I find that they appear in contemporary statutes made by the Sovereign in pursuance of the letters patent.

" In addition to the letters patent aforementioned, my attention was drawn to Halsbury's Laws of England, 2nd ed., vol. XI., p. 475, concerning the exemption of Peculiars, and p. 871 concerning the right to attend church. The right to attend divine service in a church is limited to those who have by statute the duty to attend divine service. By the Act 5 & 6 Edw. 6, c. 1 (1551), the duty to attend divine service within a parish church is upon parishioners only, and inferentially the magistrate was of opinion that anyone other than a parishioner could be excluded by the Dean and Chapter. The appellant did not claim to be a parishioner, and could produce no evidence of permission having been given him to be there."

Basil Blagden for the appellant. The magistrate was wrong in dismissing the information.

The respondent in ejecting the appellant from the Abbey committed an assault upon him for which he was liable to conviction unless his action was justified by the order of the dean that the appellant was to be excluded from the Abbey. The respondent's action was not justified by that order if at the time of his ejection the appellant had a legal right to be in the Abbey. The appellant had a right to be in the Abbey at that time.

Assuming that the appellant would have been entitled to be in the Abbey if he had not been wearing his badge as a guide, the fact that he was wearing it did not disentitle him to be there. The badge merely indicated that the appellant's occupation was that of a guide. It did not indicate that he was a guide to the Abbey. The case does not find that the appellant went to the Abbey to ply for hire, and the fact that divine service was then in progress shows that he was not there for purposes of business. The case finds that there was no misconduct by the appellant, and it should be construed as meaning that he was only present as a worshipper.

If the wearing of his badge did not disentitle the appellant to be in the Abbey at the time in question, he had a right to be there at that time as a member of the public. The Abbey is a public building and as such open to all members of the public. This appears from the enactments by which it is constituted and governed. By virtue of the Act of 1539, 31 Hen. 8, c. 13, for the dissolution of the monasteries, the monastery of Westminster was dissolved and its property granted to the King. By letters patent granted by Queen Elizabeth in 1560, and statutes made in pursuance thereof, the Abbey is constituted a collegiate church under a corporate body, namely the dean and canons, and it is given to the dean

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and canons, the control of it being assigned to them, and the government of it to the dean, who is not, however, appointed its absolute lord and master with power to make any order he pleases. The Abbey, though a collegiate church, is nevertheless a church, which is a building for public worship, as appears from the primary definition of the term in the Oxford Dictionary. It is in general a public building to which any member of the public has access at reasonable times so long as he behaves himself. The Abbey has no parish attached to it, at least in the ordinary sense of the word, and therefore no parishioners, and the only persons who can attend its services are members of the public. The fact that the Abbey is open to the public appears also from the enactments regulating the worship in that as in other churches. An Act of 1548, 2 & 3 Edw. 6, c. 1, recites that the King had appointed certain persons to draw up an order of " common and open prayer," and that it was desired that all ministers should be bound to use that book; and that was enacted accordingly. An Act of 1551, 5 & 6 Edw. 6, c. 1, required that all persons should resort to their parish church, or upon reasonable lett thereof to some usual place where " common prayer " shall be used upon every Sunday and holy day. That Act was repealed by 1 Mar. Sess. 2, c. 2, but was re-enacted in almost identical terms by the Act of Uniformity, 1558 (1 Eliz. c. 2), s. 4 of which further provides that if any minister refuse to use the " common prayers," or use any other open prayers than are set forth in the prayer book he shall be punished, and defines the expression " open prayer " as meaning " that prayer which is for others to come unto or hear in common churches or private chapels." That was the state of the law in regard to worship in churches at the time when Westminster Abbey was made a collegiate church. The Act of Uniformity, 1662 (14 Car. 2, c. 4), entitled an Act for the uniformity of " public prayers," provides by s. 2 that all ministers in any cathedral, collegiate or parish church or chapel or other place of " public worship " shall be bound to use all the " public and common prayer " in the order mentioned in the book annexed to the Act. In the prayer book the rubric for the Lord's Supper directs the exclusion of evil livers, implying that other persons be not excluded. The Public Worship Regulation Act, 1874 (37 & 38 Vict., c. 85), in its short title and title refers to the church service as "public worship," and by s. 6 defines the word church as meaning any place of "public worship" in which the incumbent is required to conduct service according to the book of "common prayer." All that legislation was inspired by the spirit of the Reformation which sought to get rid of the religious houses of monastic orders and to substitute for them churches in which there should be open and common worship. It is laid down in Canon 51 that the deans of any cathedral or "collegiate church" shall suffer no stranger to preach to "the people in these churches," except as therein mentioned: see Gibson's Codex, Tit. 14, c. 4. In *Jarratt* v. *Steele* (1), Sir J. Nicholl said in the course of his judgment that the possession of a church is in the minister and churchwardens, and that "no person has a right to enter it when it is not open for divine service, except with their permission"(2); and that statement implies that when the church is open for divine service any person has a right to enter it without permission. In the case of *In re St. Columb, Londonderry* (3), it was held, in regard to a place which was both a cathedral and a church subject to the ordinary, that every parishioner had a right to be seated in a church, but that persons not parishioners had no right to a sitting; and that decision implied that a non-parishioner has a right to be present in a church during service. In *Taylor* v. *Timson* (4) it was laid down that a churchwarden has no right to prevent an inhabitant of a district from entering a church for the purpose of attending service even though he cannot be conveniently accommodated; and Stephen J. there said that he had heard of no authority that a man behaving himself with perfect propriety was liable to be removed by the churchwardens because there was no seat for him, (5) and that, while *Walter* v. *Gunner* (6) decided that a parishioner had a right to a seat in the church, it did not show who was or was not a parishioner (1). That last observation shows that the judge had in mind the possibility of non-parishioners coming to church.

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(1) (1920) 3 Phil. 167.

(2) Ibid. 169, 170.

(3) (1863) 8 L. T. 861.

(4) (1888) 20 Q. B. D. 671.

(5) Ibid. 676.

(6) (1798) 1 Hagg. Const. 314.

Monckton K.C. and *G. G. Raphael* for the respondent. The magistrate rightly dismissed the information.

The respondent ejected the appellant from the Abbey pursuant to a lawful order of the dean and without unnecessary force. His action was therefore justified and he could not be convicted of assault.

Even if the dean had no right to exclude the appellant from the Abbey as a member of the public, he had a right to exclude him because of his wearing his guide's badge there. It is true that the magistrate has found as a fact that there was no misconduct on the part of the appellant, but that finding only means that the wearing of the badge did not amount to actual misconduct, and does not mean that it was not conduct improper and unbecoming in a person entering the Abbey during service. The appellant has stated in evidence that he wore the badge in the Abbey because it advertised the occupation by which he earned his livelihood, and because guides are wanted in the Abbey.

The dean had a right to make the order excluding the appellant as an ordinary member of the public from the Abbey. By the letters patent granted by Queen Elizabeth in 1560 the Abbey and its site were dedicated to be a collegiate church, and granted with all ancient privileges to the dean and chapter who are constituted a body corporate. By virtue of these letters patent and statutes enacted shortly afterwards in pursuance thereof the dean and chapter have control of the Abbey, but " the government of the whole college and all its parts " belongs to the dean, who is the ordinary and is subject only to the control of the Sovereign as visitor. The Abbey is thus a " royal peculiar," and the dean as the representative of the Crown has the regulation and management of it. The Abbey being a collegiate church is a church. A church is not a public building in the sense that it is open at all times to members of the public. In the

(1) 20 Q. B. D. 671, 677.

case of a parish church, the parishioners would appear to have a right, correlative to the duty imposed upon them by the Act of 1551, 5 & 6 Edw. 6, c. 1, to resort there during divine service on Sundays and holy days, but any person claiming a wider right of entry can be excluded by the incumbent or churchwardens: see *Taylor* v. *Timson.* (1) In the case of a private chapel, there would seem to be a corresponding right and duty on the part of those who are admitted by licence of the proprietor, but any other person claiming to enter may be excluded by the proprietor: see *Hancock* v. *Stephens* (2); and *Bosanquet* v. *Heath.* (3) There is little practical distinction between these two places of worship, in each of which the right of a person to be present is probably correlative to the duty of a parishioner to be present in his parish church. The public have no greater right to enter the Abbey than they have to enter a parish church or private chapel, and the dean has absolute power to exclude any member of the public unless prevented by the visitor. He has, indeed, power to close the Abbey to the public altogether. It is not the fact that Westminster Abbey has no parish attached to it. The close or precincts of the Abbey constitute its parish, and the persons residing there, as, for example, masters of Westminster School, officials, and pensioners, are the parishioners. The Acts of Uniformity, in requiring that common, open, or public prayer shall be said in churches, do not intend that any member of the public has a right to be admitted to a church, because prayers may be publicly read even in private chapels and houses from which the public may be excluded: *Barnes* v. *Shore* (4); *Freeland* v. *Neale* (5); and *Nesbitt* v. *Wallace.* (6) The object of these enactments was not to admit all persons to a church, but to insure that instead of a private mumbled prayer there should be a prayer audible and intelligible to all the people present in the church.

Basil Blagden, in reply. The cases last cited do not show that prayers may be publicly read in a place which is not open

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(1) 20 Q. B. D. 671.
(2) (1915) 31 Times L. R. 434.
(3) (1860) 3 L. T. 290.
(4) (1845) 1 Rob. Ecc. 382.
(5) (1848) 1 Rob. Ecc. 643.
(6) [1901] P. 354.

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to the public, because in these cases the premises, though nominally private chapels or rooms, were in fact places to which any member of the public who conducted himself properly could have access during the service. It was otherwise in *Hancock* v. *Stephens* (1), where members of the public were only admitted to the private chapel there in question by special permission of the owners. It is to be observed that, though Westminster Abbey is a royal peculiar, it is the only royal peculiar which is not a private chapel, but a church, to which it is submitted the public have a right to be admitted. The case should be remitted to the magistrate with a direction to convict the respondent.

LORD HEWART C.J. In my opinion this is a perfectly clear case. The first question is what does the case stated mean. I think that the learned magistrate has left no doubt as to the meaning that he intended to express by it. The appellant, at whose instance the case was obtained, appeared at Bow Street police court on December 13 last to prefer an information under the common law and under the Offences Against the Person Act, 1861, s. 42, against a particular police constable for that on the previous day he unlawfully assaulted the appellant. The magistrate, having heard that information, dismissed it.

The facts found are these: [His Lordship stated the facts as set forth in the case up to the appellant's ejection from the Abbey, and continued as follows:] The case, having found as a fact that on the day of the alleged assault the appellant was wearing this badge inscribed in the manner stated, goes on to say that there was no misconduct by the appellant on that day before his ejectment. It is perfectly obvious, therefore, that the magistrate, who has a habit of expressing himself with precision, was drawing a contrast between actual misconduct, that is to say, something in the nature of brawling, on the one hand, and wearing a badge offering services as a guide on the other hand. The appellant was not guilty of any misconduct in the ordinary sense of the term, but by wearing his badge he was engaged in offering his services to sightseers as a guide.

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(1) 31 Times L. R. 434.

The case then sets out the contentions of the parties. Those of the appellant were inter alia that the Abbey is a public church, licensed for the public celebration of holy matrimony and baptism and open for public service, that the dean had no authority to make an order excluding the appellant from the Abbey, and that therefore the constables were guilty of an assault in ejecting him. The respondent contended that under the letters patent granted by Queen Elizabeth in 1560 the Abbey was handed over to the dean and chapter with all its ancient privileges, and that they were appointed under the Queen to control the Abbey; that, by virtue of these ancient privileges, not only was the Abbey subject neither to archiepiscopal nor episcopal control but to the dean "belongs the government of the whole college and all its parts"; and that therefore the constables were justified in ejecting the appellant as in so doing they were carrying out the lawful orders of the dean. The magistrate adds that the appellant did not claim to be a parishioner and could produce no evidence of permission having been given him to be there. The opinion which the magistrate formed was that under the law the dean and chapter acted within their powers in excluding the appellant and accordingly he dismissed the information.

The only question which this case raises is whether in so dismissing the information the magistrate came to a correct determination in point of law. I am bound to say that to my mind this case has become invested with a manifest air of unreality. At no time did this appellant say, or say in effect, that though he went into the Abbey as a guide wearing a badge, he desired to remain there as a devout worshipper. What he did say by way of argument was that it was true that the authorities excluded him because he was offering his services as a guide although a permit to do so had been refused to him, but that they could not properly exclude him at all, because in theory at any rate he might have been taking part in public worship.

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That argument is, in my opinion, an afterthought designed to cover what the appellant was really doing. It is, in short, a sermon upon the ancient text " Virtus post nummos." The appellant was complaining not that the dean had interfered with his devotional exercises, but that he had interrupted the flow of half-crowns from sightseers to the appellant as a guide, and having failed about the nummos he now asks what about his virtus ? He never said until recently that his real object in being in the Abbey was to worship. In those circumstances, especially when one remembers that on the application for this case it was stated with engaging frankness that what was being interfered with was the appellant's livelihood—not his immortal soul but his livelihood—it seems to me that the excursions into ecclesiastical law and constitutional history to which we have listened, however edifying and ably conducted, are here irrelevant.

The magistrate was entitled to dismiss this case, because it was obvious to those who looked at the facts that the appellant, having been refused a permit to act as a guide in the Abbey, was nevertheless claiming to be in the Abbey as a guide and to hold out his services as such although he knew perfectly well that he had no right to do so. To deal, if one may, in a sentence with the interesting afterthought which has been developed, it is said that the claim put forward by the dean of Westminster Abbey was too large in that he was claiming at his own discretion to exclude the appellant from the Abbey. Nobody suggests that the dean would exercise his discretion in any circumstances in an arbitrary or capricious way, but it is said that if the matter rested upon a particular application of the universal authority in the dean to exclude any person from the Abbey then the order to exclude the appellant must have been wrong. In my opinion that conclusion does not follow. I cannot imagine that any argument of a useful kind can be drawn either from the dimensions of Westminster Abbey or the magnificence of the building. What one has to look at is the position of the Abbey in law. I am satisfied upon the evidence and the argument that Westminster Abbey is in the legal position of being a royal peculiar, and that it was within the competence of the dean to give instructions that the appellant was to be excluded therefrom. In those circumstances, I think that this appeal fails and should be dismissed.

DU PARCQ J. I agree in the result, but, as in my opinion this case raises a question of public importance and as the view which I take of the effect of the case stated is not the same as that of my Lord, it is right that I should express my view in my own way, and it is, I hope, unnecessary to add that where it differs in any way from his I express it with unfeigned diffidence.

The facts are these: [His Lordship stated the facts substantially as set out in the special case and, after observing that there was no finding that at any time during the three years before the alleged assault the appellant had made any attempt to act as a guide in Westminster Abbey; and that he took the finding that the dean gave instructions that the appellant was to be excluded from the Abbey to mean that he was to be excluded at all times and in all circumstances and whether the appellant was desirous or not of acting as a guide; he continued as follows:] I find it difficult to suppose that, if the appellant had not been wearing the badge, the police constable, who we are told acted in pursuance of the instructions of the dean, would have thought that he was entitled to use his own discretion and not expel the appellant from the Abbey, and I do not understand that the dean left it to the discretion of any police constable or other officer to decide whether in the circumstances the appellant was seeking to act as a guide. Nor do I find that the learned magistrate has so drawn this case as to raise the question whether the fact that the appellant was wearing that badge was a sufficient justification for his exclusion from the Abbey, assuming, as for this purpose one must assume, that there was no right in the dean, or those acting by his orders, to exclude the appellant so long as he was behaving decorously and with propriety. I do not find that it was contended before the magistrate that, because the appellant was wearing that badge he was properly excluded. The contentions on the part of the respondent were put in the case in this way. [His Lordship read these contentions, and continued :] The order of the dean, which is described in these contentions as the "lawful" order, was an order that the appellant was to be excluded from the Abbey. When this case first came before this Court, it appeared to me, especially when I understood Mr. Raphael, the learned junior counsel for the respondent, to say that he was claiming a right in the dean to exclude any person at his discretion from divine service in the Abbey, that a question of importance was being raised, and the Court thought that it was not satisfactory that a decision should be come to on that question upon an argument presented on the one side only by the appellant in person, who did not claim to be an authority upon ecclesiastical law. In the circumstances it seemed right to the Court to offer to the appellant the services of learned counsel. In the result Mr. Blagden has been good enough to argue the case on behalf of the appellant and, if I may say so, I feel grateful to him for the assistance which he has given to the Court by an argument which I have found not only interesting, but valuable.

I think that I have sufficiently indicated the reasons which make it difficult for me to say that this case raises the first of the two questions which was dealt with in argument by Mr. Monckton, that is, whether, assuming that the dean had no right to exclude from the Abbey during divine service any person whom he thought fit to exclude, he had the right to exclude the appellant because he was wearing that badge. I think it may well be that it would have been a question of fact whether in the circumstances the wearing of that badge amounted to a breach of propriety which would justify the appellant's exclusion. So far from there being any finding of fact that it did amount to an impropriety, the finding is that there was no misconduct by the appellant on that day. I should have been disposed to read those words as meaning that in the view of the magistrate the wearing of that badge did not amount to misconduct. If it were open to the Court to deal with the matter on that point only, I should feel great

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doubt whether it could be said that the mere fact that a man who three years after he had been refused permission to act as a guide there, came into the Abbey wearing a badge which did not in terms announce that he was a guide to the Abbey, but referred only to sightseeing tours, was sufficient to justify his exclusion, if one postulates, as for this purpose one must, that he could not be excluded if he were not doing something improper. I feel this further difficulty, that it is not found as a fact, and indeed we know that it is not a fact, that the appellant was ever asked to remove the badge. I should have thought that, postulating as I say that he was otherwise behaving himself, it would have been a necessary preliminary to his ejection on the ground that he was claiming to wear a badge, that he should have been asked to remove it and refused to do so. I therefore find it necessary for the decision of this case to come to a conclusion upon the other matters which have been argued.

One other fact has been referred to by Mr. Monckton which I regard as extraneous to this case, but to which no doubt importance may be attached, and it is that in some application that he made the appellant stated that he was anxious that the matter should be speedily disposed of, not in this case alone, but in others somewhat similar, which have been dealt with by this Court, because his living depended on it. Apart from the fact that I think the matter extraneous to this case, I cannot attach much importance to that statement when I remember that in the other cases, which related to Westminster Hall and the Houses of Parliament, the appellant was claiming a right to act as a guide there. As in these two other cases out of three his living to some extent did depend upon the decision, I cannot think that that statement, even if it were not extraneous to this special case, can be used against him here.

It now remains to deal with the other points which are, in my view, the points raised by the special case, and I can deal with them very shortly because the matter has been fully discussed at the Bar, and also because, so far as this part of the case is concerned, I am happy to think that I find

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myself in agreement with my Lord. It was a matter for argument at one time whether the person who had authority to exclude any one who might properly be excluded from Westminster Abbey was, or was not, the dean, and the magistrate has dealt with that matter in the special case. Nothing need be said about that now, except that Mr. Blagden admits that if anybody could exclude the appellant it was the dean. Then Mr. Blagden says that there is authority, and in this he is right, for the proposition that inasmuch as there is a duty upon every one of his Majesty's subjects to attend divine worship on Sundays and holy days, there must be a corresponding right to enter the church at which he is to attend divine worship. It may be that his right extends only to his own parish church, but I think that Mr. Blagden is probably right in saying—though it is unnecessary to express any final opinion on it in this case—that his right would extend to any other church, if he were prevented by reasonable cause from attending his own parish church and that other church were convenient for him to attend. I do not say that Mr. Blagden was wrong in putting that proposition before us, because it is perhaps desirable that it should be present to our minds in considering this important question, but all that part of his argument really goes by the board when one remembers that divine service on the date in question was not being held either upon a Sunday or a holy day, and that there was no obligation upon the appellant to attend divine service on that day.

Mr. Blagden next said that although the appellant might not be bound to attend divine service, there was an obligation upon the dean of this collegiate church to hold divine worship every day, and that that involved the admission of the public. In my view that argument is fallacious, and is not supported by the authorities. There is no authority, as it seems to me, for the proposition that any member of the public is entitled to attend any service which is being held in a collegiate church. On the contrary, it is clear from the authorities, and I think it might be clear without them, that the fact that in a church public worship is prescribed to be held and must be conducted in a certain way, does not mean that every member of the public who wishes to attend must be admitted. It was said by the dean of arches in *Freeland* v. *Neale* (1), following what he had already said in the earlier case of *Barnes* v. *Shore* (2), that " where two or three are gathered together who do not strictly form part of a family there is a congregation, and the reading to them of the service of the church is a reading in public," but it does not follow that every one has a right to attend the service. Westminster Abbey is one of the very few churches in England which are properly described by the expression " royal peculiar," and as such it is a collegiate church. It is, in a sense, as is conceded, a parish church, and I think it is not in dispute, although I am not deciding it, that those who can properly be called the parishioners have the same right to attend as the parishioners of the ordinary parish church. But just as there is no authority for the proposition that in the case of an ordinary church people who are not parishioners, and who are under no obligation to attend service there, may, nevertheless, insist on entering the church during divine worship, so it follows that there is no authority for the proposition, which it would be still more difficult to maintain, that there is such a right in any member of the public, so far as a " royal peculiar " is concerned. Mr. Blagden has failed to satisfy me that the appellant had any right to be present in the Abbey on the occasion in question, and it is conceded that he had no duty to be present. The dean was therefore within his rights in giving instructions that the appellant was to be excluded, even during divine worship and even though he might attend as a worshipper. It follows that when he was asked to go he should have gone, and that, as he did not, the police officer was entitled, using no more force than was necessary, to remove him. I think that the dean was justified in giving the order which he gave, and that the contention that the constables were carrying out the lawful order of the dean and therefore not liable for assault was correct. For these reasons I agree that the appeal should be dismissed.

(1) 1 Rob. Ecc. 643.

(2) 1 Rob. Ecc. 382.

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GODDARD J. I agree. I take the same view of the case stated as du Parcq J. takes, and as I think, with him, that it raises a question of some general importance I propose to give, shortly, my reasons for agreeing that the appeal fails.

The proceeding in this case was a summons by the appellant against the respondent, a police constable, for assault. The assault complained of was an eviction from Westminster Abbey during divine service. It was for the constable to justify the assault. The constable justified the assault by proving an order by the dean excluding the appellant from the building. So far as the case finds, the order was an entirely general order excluding the appellant from the Abbey at all times irrespective of whether he was purporting to act or desirous of acting as a guide or not and irrespective of whether or not divine service was at the time being held. The question raised by the case seems to me to be whether or not the dean had authority to give that order.

The control of Westminster Abbey is by the Royal Charter of Queen Elizabeth vested in the dean and chapter, and the government of the Abbey is vested solely in the dean. If, therefore, the dean, who for this purpose would be in the same position as the incumbent of a church, requested the appellant to leave, the appellant would not be in the Abbey by the leave or licence of the freeholders, and therefore, unless he could show a right to remain there, he would become a trespasser. How does he attempt to show a right to be in the Abbey during the time of divine service? From the argument of Mr. Blagden, which, if I may say so, I have found both interesting and helpful, I gather that it is said that any member of the public has a right to attend a church when divine service is being celebrated. It is curious that in no reported case, so far as counsel have been able to find nor so far as I have been able to ascertain, nor, indeed, in any of the writings of the many learned civilians who have dealt with these topics of ecclesiastical law, is any authority to be found upon the subject of a non-parishioner's right to attend at a place of worship. It is clear, and it is agreed on all hands, that a parishioner has a right to attend his parish church, but the magistrate in this case, and, indeed, some writers, have expressed the view that the right to attend is limited to those who have by statute the duty to attend divine service. In other words, it is said that the right to attend divine service in the parish church is merely correlative to the duty which is imposed by the Act of Uniformity of Edw. VI. and the Act of Uniformity of Elizabeth to attend divine service at the parish church on Sundays and holy days. I cannot think, however, that the right of the parishioner to attend his parish church depends only upon that statutory obligation. I think that it must be of far more ancient origin, and that it may be described as a common law right. The church, by being dedicated to sacred uses, is being dedicated to the use of the parishioners to be there for worship, and it seems to me, therefore, that the right of the parishioner to attend his church, which is indeed regarded by all writers upon the subject as clear, depends not upon the statute law but upon the older and wider common law.

So far as non-parishioners are concerned, it seems that the view that has been put forward is this : the Act of Uniformity provides that a person is to attend his parish church on Sundays and holy days or, if there is a reasonable let—that is to say a hindrance—from his attending his parish church he is to attend at some other usual place of worship. Therefore, if a man is prevented from attending his parish church he may have the right to present himself at another place of worship. I am not satisfied that the Act gives him a right to demand admission. What I think it does provide is that if he were, as in theory he might still be, prosecuted in the spiritual court to be admonished for not attending, he would have a good defence to the suit by saying that he presented himself in accordance with the Act at some other usual place of worship and was not admitted. I, at any rate, can find no clear authority, and I am by no means satisfied, that anybody has a legal and enforceable right to attend at any church of which he is not a parishioner.

Mr. Blagden's argument has also been that the right must arise because of the statutes which direct the public reading of prayers, a duty which is put not only on the incumbents of parish churches, but on the chapters of cathedrals and collegiate churches, and the use of the book of common prayer under the Act of Uniformity. But as it seems to me the object of the Acts of Uniformity was to ordain that where there is congregational worship, as distinct from private and family devotion, the prescribed liturgy of the Church of England and none other must be used, and apart from the cases that have been cited to-day I find in the Act of Uniformity, in the parenthesis which defines what open prayer means, these words : " By open prayer throughout this Act is meant that prayer which is for others to come unto or hear, either in common churches or private chapels or oratories, commonly called the service of the church." No one suggests that a person has a right to enter into a private chapel, such as is very often attached to a large house, or to such a place as the Church of the Temple, but nevertheless the Act provides that if others come to hear the service in those places, that is to say if they are permitted to come and hear it although it be in a private chapel, the common prayer is to be used. I do not think therefore that light is thrown on this question by the fact that common prayer must be used at any congregational service which may be held at Westminster Abbey or elsewhere. I do not think that that affords any assistance in determining who has the right to attend. As at present advised I am of opinion that no one can claim a right to attend a church unless he be a parishioner of the church, although it may be that, if he is prevented from attending his own church on a Sunday or holy day he may have a right to go to some other usual place where the service is usually held.

When we come to the particular church, in this case Westminster Abbey, we find that it occupies a very special position. It is a royal peculiar. It is not a parish church in the ordinary sense of the word, the parishes of Westminster being St. Margaret's and St. John's, both of them formerly Archbishop's peculiars. It is not a cathedral, for there is no See of Westminster. If it were a cathedral, then according to the opinion of many learned civilians and also according to a case in Ireland directly on the point (1), it would be the parish church of the diocese and possibly any inhabitant of the diocese would have a right to enter it. If Westminster Abbey is in any sense a parish church, the only parishioners are the persons who live in the close or precincts. The Abbey is a royal peculiar established by the Charter of Elizabeth, the dean and canons being set up as the chapter of Westminster. They are freed from any visitorial jurisdiction either of the archbishop or the bishop, the Sovereign being the visitor and the only person who can control the actions of the chapter. In fact the Abbey is in exactly the same position as the other royal peculiars of St. George's at Windsor and the Chapels Royal.

If it be said that any member of the public has the right to enter a royal peculiar while service is being held, I ask upon what legal principle that right can rest. It is not suggested that it is based on prescription. There is no common law right to enter private property, nor is there any authority to support the view that any member of the public may enter any church where divine service is in progress. I am bound to say that at one time I was impressed by the fact that marriages take place in the Abbey and also ordinations, and that it is provided that the celebrant of the marriage, or the bishop who is conducting the ordination, should at one part of the service call upon " the people " to state whether they know of any impediment why the persons should not contract matrimony, or of any defect in the ordinand which would make him unfit for ordination. Of course, it might be said that the value of that invitation to the public to state objections would be gravely impaired if people who might know of an impediment, but who were not parishioners or dwellers in the diocese could not claim to enter the church or cathedral, but I think it is enough to say for the present that on the occasion when the appellant was ejected neither a marriage was being celebrated nor an ordination service was in progress. If ever the question should arise—it is unlikely to do so—whether there is any greater or higher right in the public when these particular services are in progress and whether

(1) *In re St. Columb, Londonderry,* 8 L. T. 861.

there is any right to prohibit any person from entering the Abbey, it can then be decided, but it does not arise in this case. While it is not to be supposed that the dean of Westminster would ever desire to exclude any person from the Abbey except for some good and sufficient reason, he has, in my opinion, as the governor of a royal peculiar, the right to exclude the public or any member of the public, except perhaps those living in the precincts, without being called upon to justify his action. It follows that, in my opinion, the police constable was obeying a lawful order in the ejection of the appellant and that the summons was rightly dismissed.

Appeal dismissed.

Solicitor for appellant: *E. Gordon Lawrence.*

Solicitor for respondent: *The Solicitor to the Metropolitan Police.*

J. R.

CROYDON CORPORATION *v.* OLDAKER.

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Oct. 20, 21, 30.

Local Government—Urban Authority—Street works—Service of notice on owner of frontage—Non-compliance—Conveyance of frontage to third person before expiration of time limited for execution of works—Notice demanding payment of estimated cost of works—"Owner in default"—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 150—*Croydon Corporation Act,* 1884 (47 *&* 48 *Vict. c. cxli.*), *s.* 39.

Sect. 150 of the Public Health Act, 1875, enables an urban authority to give notice to the owners of premises abutting on a street (not being a highway repairable by the inhabitants at large), requiring them to sewer, level, and pave it, and on default to execute the works and recover the expenses from the owners in default according to the frontage of their premises.

By s. 39 of the Croydon Corporation Act, 1884: "(1.) Whenever the corporation put in force the provisions of s. 150 of the Public Health Act, 1875, they may before themselves executing any works as therein provided recover in a summary manner the amount of the estimated cost thereof from the owners in default according to the frontage of their respective premises . . . ."

The Croydon Corporation caused a notice under s. 150 of the Public Health Act, 1875, to be served on the respondent, as owner of two strips of land having frontages on a street in the borough (being a street not repairable by the inhabitants at large), requiring the works specified in the notice to be carried out within three months from the service of the notice. At the date of the service on him of the notice, the respondent was the "owner" of the two strips of land in question, within the meaning of s. 150 of the Act of 1875, but he did not comply with the requirements of the notice. Before the end of the three months limited in the notice for the execution of the works the respondent conveyed the two strips of land to a third person. In pursuance of s. 39 of the Croydon Corporation Act, 1884, the corporation served a notice on the respondent demanding payment of the proportion of the estimated cost of executing the works attributable to the two strips of land in question:—

Held, that the word "owner" in s. 39 of the Act of 1884 means the person who was the owner of the frontage when the notice was served requiring the work to be executed. If he fails to execute the work he becomes the "owner in default" within the meaning of s. 39. He cannot excuse himself from doing the work, nor cease to be in default by conveying the land to a third person after receiving the notice. The respondent was therefore liable to pay the amount claimed.

CASE stated by Croydon justices.

At a court of summary jurisdiction sitting at Croydon a complaint was preferred by the Mayor, Aldermen and burgesses of Croydon (hereinafter called "the appellants") claiming from Joseph Pulley Oldaker (hereinafter called "the respondent") under the provisions of s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55) (1), and s. 39 of the Croydon Corporation Act, 1884 (47 & 48 Vict. c. cxli.) (2), the sum of 261*l.* 5*s.* 4*d.*, being the estimated amount

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(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150: "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such notice.

Before giving such notice the urban authority shall cause plans and sections of any structural works intended to be executed under this section, and an estimate of the probable cost thereof, to be made under the direction of their surveyor, such plans and sections to be on a scale of not less than one inch for eighty-eight feet for a horizontal plan and on a scale not less than one inch for ten feet for a vertical section, and, in the case of a sewer, showing the depth of such sewer below the surface of the ground: such plans sections and estimate shall be deposited in the office of the urban authority, and shall be open at all reasonable hours for the inspection of all persons interested therein during the time specified in such notice; and a reference to such plans and sections in such notice shall be sufficient without requiring any copy of such plans and sections to be annexed to such notice.

If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises . . . ."

(2) Croydon Corporation Act, 1884 (47 & 48 Vict. c. cxli.), s. 39: "(1.) Whenever the Corporation put in force the provisions of s. 150 of the Public Health Act, 1875, they may before themselves executing any works as therein provided recover in a summary manner the amount of the estimated cost thereof from the owners in default according to the frontage of their respective premises and in such proportion as is settled by the surveyor of the corporation or (in case of dispute) by arbitration in manner provided by the Public Health Act, 1875.

(2.) If the actual cost of such works shall be less than the amount of the estimated cost the corporation shall reimburse to each person from whom a

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apportioned against him in respect of the expenses to be incurred by the appellants in the sewering, levelling, paving, metalling, channelling and making good of a street in the borough of Croydon called The Close, in Woodmansterne Road, on default of the respondent. The complaint was heard by the justices on March 17, 1936, and was dismissed. The justices stated this case.

On the hearing of the complaint the following facts were proved or admitted:—

On June 24, 1935, the appellants, by resolution passed in pursuance of s. 150 of the Public Health Act, 1875, authorized notices to be served on the respective owners of the premises fronting, adjoining or abutting on such parts of "The Close," in the county borough of Croydon (being a street not repairable by the inhabitants at large), as required to be sewered, levelled, paved, metalled, flagged, channelled or made good, requiring them to carry out the necessary works within a time to be specified in such notice. Before giving such notice the other steps required to be taken under that section with regard to the making and deposit of plans and sections of the structural works intended to be executed, and of an estimate of the probable cost thereof, were duly taken by the appellants.

The notice to repair was served on the respondent on June 27, 1935, as owner of two narrow strips of land having respectively frontages of 221 ft. 4 in. and 220 ft. 3 in. to the street, requiring the works specified in the notice to be carried out within three months of the service thereof, together with a notice of apportionment of the estimated cost of the works.

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proportion of the estimated cost shall have been recovered the difference between his proportion of such actual cost and the amount recovered from him.

(3.) If the actual cost of such works shall be greater than the amount of the estimated cost the corporation may recover in a summary manner or as private improvement expenses the difference between such actual cost and the amount of such estimated cost from the owners in default in the same proportions as they had been liable to contribute before the works were executed.

(4.) The corporation shall keep separate accounts of all moneys recovered and expended by them in the execution of the provisions of this section."

The respondent was "owner" of the two strips of land in question within the meaning of s. 150 of the Act of 1875, at the date of service on him of the notice to repair. The two strips of land were each a few inches only in width and fences had been erected thereon by the respondent in such a way as to prevent access thereover to the street from adjoining lands. The fences were erected by the respondent in pursuance of covenants contained in conveyances made between the Ecclesiastical Commissioners for England and the respondent when the respondent purchased the two strips of land together with other lands adjoining, whereby the respondent covenanted to fence off the lands conveyed to him with a 6 feet close-boarded fence.

On June 28, 1935, the two strips of land in question were properly and effectively conveyed by the respondent to one Thomas Grant, his former coachman. The respondent paid to Thomas Grant the sum of 5*l*. on completion of the conveyance, though this was not stated in the deed of conveyance.

The notice to repair was not complied with by the respondent.

In pursuance of s. 39 of the Croydon Corporation Act, 1884, the corporation served a notice on the respondent on October 4, 1935, demanding payment of the sums of 130*l*. 19*s*. 1*d*. and 130*l*. 6*s*. 3*d*. (with other moneys in respect of other properties not the subject of this case), being the proportion of the estimated cost of executing the works, attributable respectively to the two strips of land referred to, settled by the appellants' surveyor in accordance with the provisions of the section. The appellants also served demands for payment of the sums above mentioned in respect of the same two strips of land on Thomas Grant, to whom the two strips of land were conveyed on June 28, 1935.

At the date of the demand the appellants had not themselves executed the works referred to in the notice to repair.

The respondent refused to pay any part of the amount claimed by the appellants, who thereupon (on December 20, 1935), lodged a complaint claiming the sum of 261*l*. 5*s*. 4*d*. from the respondent, and he was summoned to appear before the justices on March 17, 1936. It was contended on the part of the appellants that (*a*) the respondent, being the owner of the said lands at the date of service of the notice requiring him to repair the street, and the person who, as owner, was required to do the work, was in default by not having done it, and was thus the "owner in default" within the meaning of s. 39 of the Croydon Corporation Act, 1884; (*b*) a person who became owner after the date of service of the notice to repair cannot be an "owner in default" for the purpose of s. 39, not having been served with a notice requiring him to repair the street from which he could default; (*c*) s. 257 of the Public Health Act, 1875, which enables the local authority to recover private street works expenses incurred by them from the person who is the "owner" when the works are completed does not apply where it is sought to recover estimated expenses; and (*d*) the appellants were entitled to recover from the respondent in a summary manner the estimated cost of the said works apportioned against the two strips of land in question.

It was contended on the part of the respondent that (1.) the cost of the private street works could only be recovered summarily under the provisions of s. 39 of the Croydon Corporation Act, 1884, from a person who is in law an owner in default, (2.) the respondent at the date of the conveyance of the lands to Thomas Grant was not an owner in default within the meaning of s. 150 of the Public Health Act, 1875, or of s. 39 of the Croydon Corporation Act, 1884, because the period of three months which was specified in the notices requiring street works to be done had not expired, (3.) an owner cannot be an owner in default until the expiration of the period specified in the notices within which the street works are to be done, (4.) at the expiration of the period of three months specified in the notices the respondent was not the owner of the strips of land in question and was not therefore an owner in default within the meaning of s. 150 of the Public Health Act, 1875, and s. 39 of the Croydon Corporation Act, 1884, and (5.) the appellants were not entitled to recover from the respondent in a summary manner

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the estimated cost of the street works apportioned against the two strips of land referred to.

The attention of the justices was directed to the following decisions: *Reg.* v. *Swindon New Town Local Board* (1); *West Ham Corporation* v. *Grant* (2); *Tottenham Local Board* v. *Williamson* (3); *Millard* v. *Balby-with-Hexthorpe U. D. C.* (4); *East Ham Urban District Council* v. *Aylett* (5); and *Belfast Corporation* v. *Hill.* (6)

The justices being of opinion that there could be no default until the expiration of the time given in the notice to repair and it having been established that at the expiration of that time the respondent was no longer the owner of the premises, they were also of opinion that the respondent was not the "owner in default" within the meaning of s. 39 of the Croydon Corporation Act, 1884. They therefore decided that the respondent was not liable to pay to the appellants the amount claimed, and dismissed the complaint.

S. G. Turner K.C. and *T. G. Talbot* for the appellants. The Public Health Act, 1875, s. 150, empowers an urban authority to require the owners of premises fronting, adjoining or abutting on a street (not being a highway repairable by the inhabitants at large) to sewer, level and pave it, etc., and, on default of such owners, to do the work themselves, and recover the expenses incurred in the execution of the work from the owners in default. But it was held in *Reg.* v. *Swindon New Town Local Board* (1), that those expenses could not be recovered from any one who, though the owner of premises when notice was first given by the urban authority, had ceased to be owner before the completion of the works. In this case the Croydon Corporation Act, 1884, by s. 39, adds to this power by enabling the Croydon Corporation to recover the estimated cost of executing the work from the owners in default before themselves executing the work. The respondent here, who was the owner of two strips of land

(1) (1879) 4 Q. B. D. 305.
(2) (1888) 40 Ch. D. 331.
(3) (1893) 57 J. P. 614.
(4) [1905] 1 K. B. 60.
(5) [1905] 2 K. B. 22.
(6) [1904] 2 I. R. 105.

fronting, adjoining or abutting on the street, when the notice to repair was served, did not do the work himself, and by conveying the premises to a third person he had made compliance by himself with the notice impossible. The respondent is therefore an owner in default.

In *West Ham Corporation* v. *Grant* (1) it was held that the right conferred by the Public Health Act, 1875, s. 257, to charge the property of frontagers with the expenses of executing the works was not, by virtue of the provisions of a special Act, extended to estimated expenses. But that case is no authority where, as here, powers are claimed under s. 150 of the Public Health Act, 1875. In *In re Bettesworth and Richer* (2), which was a vendor and purchaser summons, the cost of works completed by the local board after notice to the owners was apportioned. It was held that the apportioned expenses became a charge on the premises at the date of completion and as between vendor and purchaser were payable by the vendor. See also *Millard* v. *Balby-with-Hexthorpe U. D. C.* (3), and *Tottenham Local Board* v. *Williamson.* (4)

Sect. 257 of the Public Health Act, 1875, has no application to this case. Sect. 150 of the Act of 1875 and s. 39 of the Croydon Corporation Act, 1884, must be looked at, and there the expression " owner in default " is defined as the person who was served with the notice requiring him to execute the work. The respondent is liable.

R. M. Montgomery K.C. and *Arthur Capewell* for the respondent. The expression " owner in default " cannot include one who has ceased to be owner after notice was served and before the expiration of the time limited for the execution of the work. During the whole of that time he was never in default. It is not until the expiration of the time specified in the notice that the owner becomes in default, and he does not become so then if he has ceased to be the owner. The local authority still has the remedy of charging the property under s. 257 of the Public Health Act, 1875.

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(1) 40 Ch. D. 331.

(2) (1888) 37 Ch. D. 535.

(3) [1905] 1 K. B. 60.

(4) 57 J. P. 614.

But the provisions of s. 39 of the Croydon Corporation Act, 1884, are impracticable. It is clear from the decisions that the "owner" referred to in ss. 150 and 257 of the Act of 1875 is the person who is owner when the work is completed. The same reasoning applies whether the material date is the expiration of the period fixed in the notice, i.e., three months according to the Croydon Corporation Act, 1884, or the completion of the work according to s. 150 of the Public Health Act, 1875. Under that Act the owner in default is the person who was owner (*a*) when the notice was served, and (*b*) when the work was completed. Under the Private Act—Croydon Corporation Act, 1884—he is the person who is the owner (*a*) when the notice is served, and (*b*) when the three months expire under the notice. *Reg.* v. *Swindon New Town Local Board* (1) is in favour of the respondent's case. That case has not been overruled, though one dictum in it was disapproved in *Millard* v. *Balby-with-Hexthorpe U. D. C.* (2) The respondent having ceased to be the owner of the land in question before the time limited by the notice for the execution of the works is not an owner in default, and is, therefore, not liable.

S. G. Turner K.C. in reply. *Reg.* v. *Swindon New Town Local Board* (1) is distinguishable by reason of s. 39 of the Croydon Corporation Act, 1884, and the elimination of s. 257 of the Public Health Act, 1875. Moreover, it is open to argument in the Court of Appeal that that case was wrongly decided. Sect. 39 of the local Act gave the appellants entirely new powers: see *Tottenham Local Board* v. *Williamson* (3) and *Belfast Corporation* v. *Hill.* (4)

Cur. adv. vult.

1936. Oct. 30. LORD HEWART C.J. read the judgment of the Court (LORD HEWART C.J., BRANSON and DU PARCQ JJ.) as follows: The answer to the question put to the Court in this special case depends on the true construction of s. 39 of the Croydon Corporation Act, 1884. This section adds to the powers which the Croydon Corporation already

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(1) 4 Q. B. D. 305.
(2) [1905] 1 K. B. 60.
(3) 57 J. P. 614.
(4) [1904] 2 I. R. 105.

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possess under s. 150 of the Public Health Act, 1875, and enables them " before themselves executing any works as therein provided " to recover the amount of the estimated cost thereof from " the owners in default."

It cannot now be contended that in order to comply with the section a person who was required to execute work during his ownership and omitted to do what was required of him must also be shown to be " owner " at the time when it is sought to recover the cost of the work from him. A similar contention was rejected by the Court of Appeal in *Millard* v. *Balby-with-Hexthorpe U. D. C.* (1) It was said by Collins M.R. in that case (2) that the default contemplated was " default in executing the works required to be done by the notice, not default in payment of the sum demanded." The Court expressly disapproved a dictum of Cockburn C.J. in *Reg.* v. *Swindon New Town Local Board* (3) to the effect that the " owner in default " must be a person who continued to be owner when the money was demanded.

It was contended, however, on behalf of the respondent in this case, that the expression " owner in default " was not apt to include a person who ceased to be owner after the service of the notice and before the expiration of the time limited by the notice for the execution of the work. In support of this contention, counsel for the respondent relied on the decision of this Court in the *Swindon New Town Local Board* case. (4) In his judgment in the Court of Appeal in *Millard's* case (5) Stirling L.J. used these words : " We are really asked not to apply the decision in the case of *Reg.* v. *Swindon New Town Local Board* (4) but to extend it to a case in which it is not in point. If we were satisfied with the reasoning in that case, it might be right to do so ; but, not being so satisfied, I do not think we ought to give effect to it as governing the present case."

This Court is bound by the decision in the *Swindon* case (4), which was not overruled in the Court of Appeal, but we are

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(1) [1905] 1 K. B. 60.

(2) Ibid. 64.

(3) 4 Q. B. D. 305, 307.

(4) Ibid. 305.

(5) [1905] 1 K. B. 60, 67.

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not bound, nor, in our opinion, are we entitled, to treat it as an authority for more than the precise point which it decided. There the local Board, having done work in pursuance of the provisions of s. 150 of the Public Health Act, 1875, were seeking to recover the cost of it from a person who was owner of the premises when the notice was served, but had ceased to be owner at the time when the work was completed. Sect. 257 of the same Act empowers the local authority to recover such expenses " from any person who is the owner of such premises when the works are completed." The Court was of opinion, in the words of Cockburn C.J. (1), that s. 257 might " be brought in to supplement what would otherwise be a different state of things if the 150th section stood alone." It was accordingly held that " owner in default " must be a person who continues to be the owner at the time the work is completed.

In the present case s. 257 has no application. It is manifestly impossible to read the words " owner in default " in s. 39 of the Croydon Corporation Act, 1884, as meaning the owner " when the work is completed," and we can find no adequate reason for giving to those words in that section the restricted meaning suggested by Mr. Montgomery.

In our opinion the " owner " at whom s. 39 is aimed is the person who was owner when the notice was served requiring him to execute the work. If for any reason he fails to execute it he becomes, and remains for the purposes of this section, the " owner in default." He does not excuse himself from doing the work, or cease to be in default, because he has (from whatever motive) conveyed the property to a third person after receiving the notice.

We are accordingly of opinion that the appeal must be allowed, the determination of the justices reversed, and the matter remitted to them with a direction that the respondent is liable to pay to the appellants the amount claimed by them.

Appeal allowed.

Solicitor for the appellants : *Town Clerk, Croydon.*

Solicitors for the respondent : *Cooper, Walker & Hall.*

T. W. M.

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(1) 4 Q. B. D. 305, 307.

DUNLOP RUBBER COMPANY, LIMITED *v.* W. B. HAIGH AND SON.

1936
Oct. 30.

Deed of Assignment—Creditor's assent—Principal and agent—Authority of agent—Several debts to several agents of one principal—Assent by one agent, dissent by another—Whether binding on principal.

The plaintiffs were a large company with branches at L. and B. The defendants had dealings with both branches and on August 20, 1936, owed 2*l.* 4*s.* 5*d.* to the L. branch and 59*l.* 2*s.* 8*d.* to the B. branch. On that date, being in difficulties, the defendants executed a deed of assignment to a trustee for the benefit of their creditors. The plaintiffs' agent at L. in response to a circular letter from the trustee assented to the deed, but their agent at B. subsequently refused to assent and the plaintiffs sued the defendants for 59*l.* 2*s.* 8*d.* :—

Held, that the assent in respect of the L. debt was an assent binding the plaintiffs in respect of all debts due to them : and that it was not open to them afterwards, either through their agent at B. or otherwise, to dissent.

ACTION in the Short Cause List before Macnaghten J.

The plaintiffs' claim was for 59*l.* 2*s.* 8*d.*, being the price of goods sold and delivered.

The plaintiffs, the well known Dunlop Rubber Company, have branches in London, Birmingham, Liverpool, and elsewhere, the branches being under the control of local agents. The defendants, a firm carrying on business at 18 Fountain Street, Halifax, were indebted to the plaintiffs, as was admitted, for goods supplied both by their branch at Birmingham and also by that at Liverpool. On August 20, 1936, the defendant partners, Edgar Haigh and Wallace Haigh, executed a deed of assignment for the benefit of their creditors, appointing one Baker as trustee thereof. The deed, which was a printed form with the names and addresses of the parties inserted in type, was made between the defendants of the first part described as " the debtors," the trustee of the second part, and " the several persons companies partnerships and firms being creditors of the debtors whose names and addresses are set forth in the schedule hereto and all other persons (if any) who are now creditors of the debtors and shall assent hereto in writing or otherwise all of which parties are hereinafter called the creditors of the third part." The schedule to the deed was in fact left blank. The deed recited that the defendants were indebted to the creditors named in the schedule and to other persons and that the creditors had agreed to accept the proposal and to enter into the covenants therein contained. The deed then declared that the defendants as beneficial owners thereby assigned all their property to the trustee for the benefit of the creditors. Clause 12 of the deed provided that the creditors "do and each of them doth hereby release the debtors from all debts claims and demands of the creditors respectively against the debtors of whatsoever nature or kind the same may be."

On August 21 the trustee sent a circular letter to all creditors of whom he had knowledge, setting forth the execution of the deed and enclosing a form of assent to be signed by the creditor and returned, if the creditor was willing to do so. At that date the sum of 59*l.* 2*s.* 8*d.* was due from the defendants to the plaintiffs for goods supplied from the plaintiffs' Birmingham branch and also the sum of 2*l.* 4*s.* 5*d.* for goods supplied from the plaintiffs' Liverpool branch. Copies of the circular letter were sent by the trustee to the plaintiffs at both their branches.

On August 24 the plaintiffs' cashier at Liverpool signed and returned to the trustee the form of assent, which read as follows:—

"To Mr. Charles Baker, W. B. Haigh and Son.
Accountant and auditor.

We the undersigned, agree to a deed of assignment executed by the above named debtor for the benefit of the general body of the creditors to Mr. Charles Henry Baker as trustee, and we agree that the trustee be authorised to pay the costs of suing creditors, and that the trustee be not required to find the security as required by the Deeds of Arrangement Act, 1914.

Dated August 24, 1936.

Amount of debt 2*l*. 4*s*. 5*d*.

Signed *per pro* Dunlop Rubber Co., Ld.
W. JENNINGS (Cashier),
Footwear Division, Walton,
Liverpool."

On August 28 the plaintiffs' agent at Birmingham wrote in reply to the trustee's circular of August 21, and refused to assent to the deed.

On September 8, 1936, the plaintiffs issued a specially indorsed writ for the amount now claimed in respect of the Birmingham debt. In answer to a summons under Order XIV. the defendants filed an affidavit, setting out the facts shortly stated above, and alleging that the plaintiffs were precluded from suing, on account of their assent to the deed on August 24. The defendants relied on clause 12 of the deed, which provided that creditors who assented thereto should, in consideration of the benefits of the deed, release the defendants " from all debts claims and demands " whatsoever.

Upon the summons under Order XIV., the Master gave leave to defend, the action to be entered in the Short Clause List. No oral evidence was given at the trial, and the facts were either admitted or disclosed by the documents.

Patrick Devlin for the plaintiffs. The authority of the company's Liverpool agent to assent to the deed of assignment was limited to debts incurred to his own branch and did not extend to other branches. He had no authority to deal either with choses in possession or choses in action of the company at Birmingham. The two offices are entirely separate, the staff is separate and the assets are separate. The onus is upon the defendants to show that the Liverpool manager had implied authority to assent in respect of debts elsewhere. He had no such express authority, and it was still open to the manager of the Birmingham branch to refuse his assent in respect of debts due to him. The Birmingham manager did so on August 28, and the plaintiffs are entitled to recover the amount of the Birmingham debt claimed in this action.

A further point is that the circular letter of the trustee was an offer only, and upon acceptance by the Liverpool branch only became a binding contract in respect of 2*l.* 4*s.* 5*d.*

Tindale Davis for the defendants. The plaintiffs are bound by the assent of their agent on August 24, and that assent covers all debts as provided in the deed of assignment. They are thus bound by the deed, which provided (inter alia) that they should not sue for their debts but should abide by the composition. The company is one corporation and the assent given is a single assent not confined to a particular debt. The deed affects all creditors who assent thereto in writing " or otherwise " (clause 12). This includes assent by their Liverpool branch in the form in which it was given. The fact that it only referred to the debt of 2*l.* 4*s.* 5*d.* does not limit the agent's authority or affect the general validity of his assent.

Holmer v. *Viner* (1) is authority for saying that a plaintiff who assents to a deed of composition cannot split his demand, and cannot, by proving some items of account only under the deed, sue later in respect of other items. In *Margetson* v. *Aitken* (2) it was held that by assenting to the release of " whatever debt is then due to her " the plaintiff was bound as to all dishonoured bills then due from the defendant which were in her hands. The assent by the plaintiffs' agent here was absolute and unconditional, and it cannot be qualified by the plaintiffs upon the evidence now before the Court: *Exchange Bank of Yarmouth* v. *Blethen*. (3) The plaintiffs must abide by the deed and cannot recover their debt from the defendants by action.

[He referred also to *Ex parte Stray*. (4)]

Devlin replied.

MACNAGHTEN J. In this action the Dunlop Rubber Co., Ld., sue Messrs. W. B. Haigh and Son (a firm) to recover a sum of 59*l.* 2*s.* 8*d.*, the balance of the price of goods sold and delivered by the plaintiffs to the defendants. The debt is

(1) (1794) 1 Esp. 131.

(2) (1828) 3 Car. & P. 338.

(3) (1885) 10 App. Cas. 293.

(4) (1867) L. R. 2 Ch. 374.

not disputed. The only defence set up is that the plaintiffs have assented to a deed of assignment executed by the defendants for the benefit of their creditors dated August 20, 1936, and that by assenting to that deed they have precluded themselves from suing the defendants for this debt. The case raises a point of law upon which there is no exact authority. [His Lordship stated the facts and continued:] It is not disputed by the plaintiffs that their agent at Liverpool had full authority to deal with the debt due from the defendants at that branch and that in respect of that debt he was authorized to assent to the deed of assignment. They admit that, had there been no other debt due to them from the defendants, the assent so given would have been binding, and that they would have been debarred from suing the defendants in respect of that debt. Indeed I think that the admission goes as far as to say that notwithstanding the subsequent dissent of the agent in charge of their Birmingham branch the assent is still valid as to the Liverpool debt, and that no action could be brought nor proceedings taken in respect of it, unless the deed of assignment should for some reason be rendered void.

No oral evidence has been given in this case, as it was thought by the parties, when the case came before the Master, that the relevant facts were sufficiently disclosed by the documents, as to which there was no dispute. It is reasonable to assume that the plaintiffs' branches at Birmingham and Liverpool are not only separate, but that the businesses are kept separately, neither branch having cognizance of the state of the accounts at the other branch. I assume that, when the agent at the Liverpool branch assented to the deed and stated that *2l.* 4*s.* 5*d.* was the amount of the debt which the defendants owed to the plaintiffs, he did not know that the defendants were indebted to the Birmingham branch at all. I also assume that, so far as *express* authority is concerned, the authority of the agent at Liverpool was limited to dealing with the affairs of the Liverpool branch. Upon this assumption Mr. Devlin for the plaintiffs contended that the assent of the Liverpool branch only applied to the debt due at that branch, and that after that assent had been given to the trustee, their agent at the Birmingham branch could dissent from the deed and that the plaintiffs could maintain the action for the recovery of the Birmingham debt. In spite of the excellent argument of Mr. Devlin this contention is not I think well founded. A creditor to whom the debtor owes two separate debts cannot assent in respect of one debt and dissent in respect of the other. The plaintiffs, no matter how many branches they may have, are in law a single person: and in my opinion the assent given by their authorized agent at Liverpool was necessarily an assent to the deed for all purposes and for all debts, and neither the Birmingham branch nor any other branch could afterwards dissent.

I find a difficulty in appreciating the other point raised by Mr. Devlin. He says that the letter from the trustee to the creditors was an offer of a contract, and that the plaintiffs' Liverpool representative only accepted the offer in respect of the Liverpool debt. That argument ignores the fact that a creditor by assenting to the deed releases the debtor from all the debts which he may owe and enters into obligations towards all the other assenting creditors. The answer to the simple question whether the Dunlop Rubber Company assented to the deed is in my view that they did so assent, and that, having assented to the deed, they are precluded from maintaining this action.

Action dismissed.

Solicitors for plaintiffs: *Clifford-Turner & Co.*

Solicitors for defendants: *Corbin, Greener & Cook, for Hepworth & Chadwick, Leeds.*

F. P. F.

LYONS *v.* COLLINS (INSPECTOR OF TAXES).

C. A.
1936
Nov. 24, 25, 26.

Revenue—Income tax—Assessments under Sch. A or Sch. B—Dispute as to annual value of lands—Valuation by "person of skill"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 138, *sub-ss.* 1, 2.

Where a person of skill appointed under s. 138 of the Income Tax Act, 1918, has given a valuation which cannot be impeached on the face of it as bad in law, the annual value of the property must be determined in accordance with that valuation.

The only essential difference between s. 138 and the previous legislation is that the verification on oath is now at the option of the Commissioners; and the only matter which the person of skill can be required to deliver on oath is the verification of his valuation; and, in so doing, he cannot be required to justify or explain the means whereby he arrived at his conclusion.

APPEAL from a decision of Lawrence J. on a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Leeds Borough, in the County of York, pursuant to s. 149 of the Income Tax Act, 1918.

At a meeting of the Commissioners held at 4 South Parade, Leeds, on August 13, 1931, S. H. Lyons, the respondent in this appeal, who was the owner of premises known as 39 and 40 Commercial Street, Leeds, appealed against assessments under Sch. A of the Income Tax Act, 1918, for the years 1927 to 1931 of 2500*l.* net and for 1931–32 of 2000*l.* net.

By a lease dated February 1, 1928, Mr. Lyons demised the premises to Messrs. Swears and Wells, Ld., and on that date the lessees sub-demised a part of the ground floor and the basement to Etam, Ld. The rent payable to Mr. Lyons under this demise was 2000*l.* a year and the rent payable under the sub-lease was 750*l.* a year. From December 1, 1923, until February 1, 1928, the premises had been demised by Mr. Lyons on a yearly tenancy to another company, Messrs. Alexandre, Ld., for 1250*l.* per annum. Between February 1, 1928, and March, 1928, with the permission of Mr. Lyons, the ground floor had been divided by a partition shutting off internal communication between the portion occupied by Etam, Ld., and the remainder of the premises.

From 1923 to 1928, inclusive, the net assessment had been

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1107*l.*, but it was not disputed that the alterations which made the premises two separate portions made such a change of property that it was a different property from that which existed previously, and, consequently, it became necessary to re-ascertain the annual value; the premises being, nevertheless, a building assessable as one entire house under Sch. A, No. 7, r. 8 (*c*).

Mr. Lyons availed himself of s. 138 of the Income Tax Act, 1918 (1), and required the Commissioners, in accordance with the provisions of sub-s. 1, to direct him to cause a valuation to be made by a person of skill, and a Mr. Hollis was duly appointed by the Commissioners.

On October 15, 1931, the Commissioners met to receive Mr. Hollis's valuation, which was as follows: April 5, 1927–28, 1200*l.*; April 5, 1928–29, 1400*l.*; April 5, 1929–30, 1400*l.*; April 5, 1930–31, 1400*l.*; and April 5, 1931–32, 1330*l.*

Mr. Hollis gave evidence before the Commissioners that he had not when making his valuation known the exact annual rent payable by each occupier, but that if he had known what these rents were this would not have altered his opinion as to the annual value. In making this he had heard, and understood, that the rent payable was in the region of 2000*l.* per annum. He stated that although he had read through the Income Tax provisions relating to the ascertainment of annual value under Sch. A of the Income Tax Acts he considered that s. 138 of the Income Tax Act, 1918, set these aside and provided for a completely independent valuation.

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(1) By s. 138 of the Income Tax Act, 1918, it is provided: "(1.) If on appeal against an assessment under Schedule A or Schedule B any dispute arises as to the annual value of any lands, tenements, hereditaments, or heritages, the general commissioners may, if they consider it necessary, and shall, if required by the appellant, direct the appellant to cause a valuation to be made by a person of skill named by them, and may require the same to be verified on the oath of such person, and the annual value shall be determined in accordance with that valuation.

(2.) If the appellant does not proceed, with effect, to cause such valuation to be made, the commissioners shall determine the annual value according to the best of their judgment.

(3.) The costs and charges of any such valuation shall abide the final determination of the commissioners. . . ."

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Mr. Lyons contended (inter alia): (*a*) that the lessees carried on the same type of business as the former occupiers and that by taking over the premises they obtained the benefit of the connection and goodwill of the former occupiers including, by the permission of Mr. Lyons, the use of their name; (*b*) that the rent reserved by the lease was not a rack-rent; (*c*) that as the said rent was not a rack-rent, it was necessary to ascertain the rack-rent in accordance with sub-para. 2 of No. 1 of the General Rules of Sch. A, and accordingly a valuation was requested under s. 138 of the Income Tax Act, 1918, for the rack-rent to be ascertained by an independent valuation by a person of skill; (*d*) that on the evidence the said rent was in excess of the rackrent; (*e*) that under s. 138 of the Income Tax Act, 1918, the annual value of the premises should be determined in accordance with Mr. Hollis' valuation; (*f*) that the assessments under appeal should be reduced accordingly.

The Inspector of Taxes contended (inter alia): (*a*) that the assessing rules of Sch. A of the Income Tax Act, 1918, were not overridden by s. 138 of that Act; (*b*) that the valuation of Mr. Hollis had proceeded on a wrong basis inasmuch as he had disregarded the provisions of the Income Tax Acts relating to the ascertainment of annual value and that consequently such valuation was not binding on the Commissioners; (*c*) that on the available evidence the annual value should be 2400*l.*

The Commissioners came to the conclusion that under s. 138 the annual value must be determined in accordance with Mr. Hollis's valuation and they reduced the assessments.

From this decision the Crown appealed to Finlay J., who upheld the Commissioners, but on further appeal on November 27, 1934, the Court of Appeal allowed the appeal in favour of the Crown on the ground that the admission of Mr. Hollis, that he had considered that s. 138 set aside the provisions relating to the ascertainment of the annual value, so vitiated his conclusions that there really had been in effect no legal valuation by him at all binding on the Commissioners. (See *Stewart* v. *Lyons.* (1))

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(1) (1934) 19 Tax Cas. 79.

On the case being remitted on February 22, 1935, Mr. Lyons again required the Commissioners to direct him to cause a valuation to be made by a person of skill, and the Commissioners accordingly named a Mr. Arthur Mosley to make a valuation. His valuation, called by him an estimate, differed from that of Mr. Hollis and was as follows: 5th April, 1927–28, 1290*l.* and 1928–32, 1365*l.* annually.

At the hearing before the Commissioners, Mr. Lyons, by his solicitor, took the preliminary point that it was not competent for the Commissioners or the parties to examine Mr. Mosley. Counsel for the Crown contended that Mr. Mosley should be examined as to the principles adopted in arriving at the valuation in order to ascertain (*a*) that he had strictly followed the provisions of the Income Tax Acts relating to annual value, and (*b*) what adjustments, if any, the Commissioners ought to make in determining the annual value in accordance with the valuation. In the result, no questions were put to Mr. Mosley by the Commissioners nor on behalf of either party to the appeal, and the Commissioners did not require the valuation to be verified by Mr. Mosley on oath.

The Commissioners stated that they then considered the estimates of the annual value put in by Mr. Mosley, the rent reserved under the lease of February 1, 1928, all the circumstances and their local knowledge of the property, and, being of opinion that the rent reserved of 2000*l.* was a rack rent and that the Rules of Sch. A of the Income Tax Act required the annual value to be based on the rack-rent, reduced the original assessment to 2000*l.* from April, 1927–32, thereby increasing the estimates of annual value given by Mr. Mosley.

Mr. Lyons appealed.

Lawrence J. said that the question raised by the Commissioners was whether they were bound to accept the valuation put forward by the person of skill in view of the fact that his estimates of annual value were below the rent reserved under the lease, which they held to be a rack-rent.

It appeared to him that the section was obviously designed for the purpose of ascertaining the annual value once and for all finally, and that it was not intended that a person of skill should be appointed to determine the annual value and should then be subject to cross-examination and review by the Commissioners. In his view the words of the section were totally inapplicable to any such view of the contents of the section. The words "may require the same to be verified on the oath of such person" seemed to him to be designed to indicate that the Commissioners were to be satisfied that the report which was produced was the report of the person whom they directed to value. Verification did not mean that a person was to be liable to examination and cross-examination as to every detail of his valuation; it simply meant that he was to verify the valuation as being his valuation. The words "the annual value shall be determined in accordance with that valuation" indicated in his view that the function of the Commissioners was finally and formally to adopt the valuation of the person appointed apart from any question of dishonesty or fraud, or apart from any invalidity on the face of the valuation. He was of opinion that the appeal must be allowed.

The Crown appealed.

Sir Terence O'Connor S.-G. and *R. P. Hills* for the Crown. The Crown seeks a direction as to what is the proper course to pursue when the person of skill comes before the Commissioners. The question is whether in the present case the report of the person of skill is a nullity.

This matter has already been before the Court of Appeal: see *Stewart* v. *Lyons*. (1) The remedies of a person who is dissatisfied with a valuation are stated in *Stocks* v. *Sulley*. (2)

Here the person of skill is alleged to have disregarded the rules applicable to Sch. A of the Income Tax Act, 1918, and to have valued the premises without regard to the rents paid.

The question is whether his valuation is to be accepted in view of the fact that his estimates of the annual value were below the rent reserved under the lease of February 1, 1928, which was held to be a rack-rent.

There is an error in Mr. Mosley's valuation on the face of it,

(1) 19 Tax Cas. 79. (2) (1899) 4 Tax Cas. 98, 105.

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as, in view of the provisions of s. 15 of the Finance Act, 1928, he had no power to vary the annual value by increasing it for the year 1928–1929 from 1290*l*. to 1365*l*.

Sect. 138 has not the effect of binding the Commissioners to adopt the valuation put by the valuer appointed by them. The final determination to which by sub-s. 3 of the section the Commissioners have to come is a determination on a review of the valuer's valuation. Sub-s. 2 suggests that the Commissioners can set aside the valuation or not deal with it.

At the hearing before the Commissioners they or the parties were entitled to put questions to the valuer. The Commissioners were entitled to put questions to him as to the principles adopted by him in arriving at his valuation.

The word " verify " does not mean " identify." Verification, under the section, means showing that the valuation is correct.

A. M. Latter K.C. and *Cyril L. King* for the respondent. The Commissioners are not empowered by s. 138 to cross-examine the valuer as to the method by which he arrived at his valuation. The annual value arrived at by the person of skill must be accepted as final and verification on oath merely means that the valuer is to verify the valuation as being his valuation.

R. P. Hills in reply.

Slesser L.J. [after stating the facts, continued :] Lawrence J. has come to the conclusion that the contention of Mr. Lyons is correct, and I am of the same opinion.

In my view, once it is established that the person of skill has given a valuation which cannot be impeached on the face of it as bad in law, that is to say, a valid valuation, the words of sub-s. 1 of s. 138 are decisive that the annual value shall be determined in accordance with that valuation. I find myself unable to agree with the opinion expressed by Lord Hanworth M.R. in *Stewart* v. *Lyons* (1) that the annual value is one which is to be determined by the Commissioners on their own responsibility. I do not think that the majority of the Court in that case founded themselves upon any such consideration. Thus Romer L.J. says: "If the valuer observes those Rules, and, applying the figures in accordance with the Rules, arrives at a certain result, a certain figure, as being the annual value, ... I doubt whether the Commissioners would be justified in going behind that valuation," and I give as the only reason why the Commissioners were not bound by the purported valuation the reason that there never was any valuation within the meaning of the Section at all.

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(1) 19 Tax Cas. 79, 92.

Now that the question has come up for determination, I must say that I entertain no doubt about it. The duty to determine the value in accordance with the valuation of the person of skill is to be contrasted with the case where, either because the Commissioners do not think it necessary or are not required by the appellant effectively to cause a valuation to be made, they have to determine the annual value to the best of their judgment (sub-s. 2). In either case, either through the person of skill or through their own judgment as the case requires, respectively, the annual value is determined and thereafter there remains the final determination of the Commissioners as to the assessment, which they must deal with as provided by s. 137, sub-ss. 4 and 5.

This view is fortified by a consideration of the provisions which were consolidated in s. 138 from s. 81 of the Income Tax Act, 1842, as amended by s. 47 of the Act of 1853. In the earlier section it was provided that it should be lawful for the Commissioners to make an assessment according to the valuation of the person of skill, but in s. 47 of the Act of 1853 this language is significantly varied and reads: "Upon such valuation being verified on the oath of the person making the same, the assessment shall be made according thereto" (a mandatory provision), which would have been otiose if the discretion contended for by the Crown in such cases had still been intended to continue. The only essential difference in the present section is that the verification on oath is now at the option of the Commissioners, but the requirement that the annual value shall be made in accordance with the valuation is not otherwise in meaning and intention altered, and the words: "The assessment shall be made according

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thereto" in s. 47 of the Act of 1853, though slightly varied, in effect stand. At most, it may be said, as was the view of the Court in *Reg.* v. *Justices of the County of London* (1), that such a phrase as "in accordance with the plans" may mean "in substantial accordance with the plans"—per Mathew J. But this points only to some trivial variation. In the present case I find it quite impossible to hold that the substitution of entirely different figures for those given by the valuer, and a corresponding assessment, can be said to be an annual value determined in accordance with his valuation.

The only other matter which is strictly in issue in this case is the validity of the valuation itself. It was contended that in so far as Mr. Mosley had taken account of the alteration in the nature of the property between April 5, 1927, and April 5, 1928, he had no power thereafter to vary the annual value at any rate until April, 1931, because the Finance Act of 1928 provided that "the annual value of any property which has been adopted for the purpose of the Income Tax under Sch. A for the year 1927–28 shall be taken as the annual value of that property for the same purpose for the year 1928–29" (see Finance Act, 1928, s. 15, sub-s. 4, and provisions to the same effect thereafter until the Finance Act, 1931), and that therefore his increase in 1928 of the valuation from 1290*l.* to 1365*l.* was bad on the face of it, and bad for the later years, at any rate until April 5, 1931.

The answer, however, is to be found in s. 26 of the Finance Act, 1923, which, dealing with appeals against Sch. A, in terms gives to the General Commissioners power to hear and determine the appeal, and confirm or amend the assessment as if the matter were one not determined by the previous years' assessment, and such a provision must of necessity extend to the valuation upon which the assessment is to be made. Doubtless, in this case, in giving a lower annual value for 1927–28, Mr. Mosley had regard to the fact that the alterations were made between February and March in the year 1928, and the section to which I have last referred enabled him to give expression to this fact in his valuation.

(1) (1889) 24 Q. B. D. 341, 345.

These findings determine the case in favour of Mr. Lyons; but a question was raised during the hearing as to the powers of the Commissioners or the parties to question the person of skill on the principles upon which he proceeded in his valuation. In the present case it is not possible to say whether the reason why no questions were asked was because the Commissioners thought that they had no power to ask them, or because they did not think that the answers would have assisted their determination, but since the matter has been canvassed I would express the view that the only matter which can be required of the person of skill to be delivered upon oath is the verification of his valuation, which is not, as has been suggested, a justification of it, or a clarification of the means whereby he arrived at his conclusion, and that, as regards other powers of questioning, whether by the Commissioners or the parties, I can find nothing in the section to indicate whether they are to be by oath or otherwise. I think that when the person of skill has completed his valuation he is functus officio, and that the most that the Commissioners are entitled to do is to ask him to explain some ambiguity in his statement, for which purpose the valuation may in appropriate cases be remitted to him, but otherwise, when the valuation is, on the face of it, a good one, and clear as to the matters submitted for valuation, the Commissioners must accept it and determine their final assessment accordingly.

Romer L.J. I agree, and have very little to add.

It will be noticed that the provisions of s. 138 of the Income Tax Act of 1918 only come into play when there is a dispute on an appeal against an assessment under Sch. A or Sch. B as to the annual value of any lands, tenements, hereditaments or heritages, and that where that is the case the General Commissioners may, if they consider it necessary, and are obliged to if required by the appellant, direct the appellant to cause a valuation to be made by a person of skill named by them. The valuation that is to be made by the person of skill plainly is not a valuation of the lands, tenements or hereditaments. That is made plain (if it is not already made plain by the words of sub-s. 1) by sub-s. 3, which provides " the costs and charges of any such valuation shall abide the final determination of the Commissioners, and, if the value so found exceeds the value alleged by the appellant, the Commissioners may order him to pay the costs and charges of the valuation," that is to say, may order him to pay such costs and charges if it turns out that the value alleged by the appellant to be the annual value of the hereditaments is not the true amount of the annual value of the lands, tenements or hereditaments. The position, therefore, is this, when the provisions of the section are brought into play: The appellant saying " I have been assessed as though the annual value of my premises were such-and-such a sum; I say that that is too much," the person of skill has to determine what is the annual value. It is the only question that is referred to him, and he determines that the annual value is such-and-such a sum; it may be the same sum as the appellant has urged; it may be the same sum as already appears in the assessment appealed against; it may be a different sum; but, whatever the sum may be, unless the Commissioners determine that that is the annual value of the hereditaments for the purposes of the Income Tax Acts, I cannot understand how it can be said that the annual value has been determined by the Commissioners in accordance with that valuation. If they determine that some sum other than that ascertained by the person of skill is the annual value, they are not determining the annual value in accordance with the valuation.

But then it is said that though that may be the effect of the language of the section, if construed in accordance with its usual meaning, yet it leads to such ridiculous results that the Court ought not to attribute that meaning to the words used. The ridiculous result to which it is said that this section leads, if construed in accordance with the ordinary meaning of the words employed, is apparently that the taxpayer is deprived of the privilege of going, or being dragged, to the House of Lords. It is perfectly true that, if the language of a statute, when given its ordinary meaning, leads to an absurd result, the Court will, if possible, put upon the language employed a meaning that does not lead to the absurd result; but for myself I cannot think that the result that has been indicated in the present case is so absurd that the Court should, even if it were possible (and I do not think it is), place upon the words "in accordance with the valuation" a meaning which those words do not prima facie possess.

On the other points which have been dealt with, namely, the question whether the valuation by the person of skill was bad on the face of it and the question as to the rights of the Commissioners or of the parties to the Appeal to question the person of skill, I have nothing to add to what has been said by Slesser L.J., and what was said upon those subjects by Lawrence J., whose decision, in my opinion, on all the points with which he dealt was correct.

Greene L.J. I agree. I wish to add only a few observations with regard to the position of the valuation made by the person of skill.

The first observation is this: s. 138 of the Income Tax Act, 1918, owes its origin to s. 81 of the Income Tax Act, 1842, as amended by s. 47 of the Income Tax Act, 1853. I do not propose to examine those sections in detail, but I call attention to the fact that the Act of 1918 was a consolidating Act, and it is not to be assumed that it was intended, in a matter of this kind, to alter the law as it previously existed. When those earlier sections are examined it will, in my opinion, appear quite clearly that the duty of the Commissioners, where a valuation was made by a person of skill, was to make their assessment in accordance with that valuation. The language of s. 47 was this: "the assessment shall be made according thereto." It appears to me to be quite impossible to construe those words as meaning that the Commissioners are merely to have regard to the valuation with the right to depart from it if they think fit to do so.

In the present section the words are "the annual value shall be determined in accordance with that valuation." I am quite unable to find, in that change of language, any change of intention. The finding of the annual value is merely a preliminary step to the assessment, and, in my opinion, the Commissioners are bound to find the annual value, and, in consequence, to make the assessment in accordance with the valuation.

It is worth noticing that, in the two earlier sections to which I have referred, the place in the section where the provisions as to costs are found removes what might have been a difficulty in sub-s. 3 of the present s. 138. All that has been done in s. 138 is that the arrangement of the provisions of the earlier sections has been recast and the form of the section is accordingly different; but the effect of it, in my judgment, is the same.

The next thing I wish to say is that the words "in accordance with" appear in other sections of the Income Tax Act, 1918. In the sections which I have happened to notice, or to which the attention of the Court has been called, it is quite obvious that the words "in accordance with" are used as meaning "in strict accordance with," that is to say, following and not merely having regard to. The sections which have been noticed are s. 121, sub-s. 5; s. 133, sub-s. 1 (*a*); and s. 149, sub-s. 4; and there may be others.

The next point is this: If there is a right in either party, or in the Commissioners, to go behind the valuation by cross-examination of the person of skill with a view to establishing that his valuation is not a proper one, I cannot myself find anything in the section which would prohibit the calling of evidence to displace or to confirm his findings. It is only by construing the section in such a way as to make the valuation final that it is possible to exclude what is the prima facie and ordinary right of both parties on an appeal to call evidence. It seems to me to be quite impossible to construe the section as leading to a sort of half-way position in which the valuation is not conclusive, but can be attacked or modified, not by direct evidence, but by cross-examination and, as in this case, by the use by Commissioners of their local knowledge. Such a result appears to me to be not only a very inconvenient one, but one at which it is quite impossible to arrive from the

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construction of the section, because, as I have already said, if the valuation is not to be conclusive there is nothing in the language of the section to take away the pre-existing right to call evidence on one side or the other.

Lastly, an alarming picture was drawn, in the course of the argument, of the consequences that might result, a picture of the person of skill confronted in the course of his duties by the alarming complexities and difficulties of Sch. A ; and it was said that it was essential that there should be power to ask the person of skill questions in order to see whether his mind had been directed to some particular point of law when he made his valuation. This picture may reflect the fears that oppress the less resolute minds of the Inland Revenue Authorities ; it leaves me quite undisturbed. It appears to me that, in the ordinary case in which this section would fall to be applied, the matter to be determined would be a perfectly simple question of fact. That, in some cases, difficulties of construction may arise and difficult questions of law may be involved is, of course, undoubted ; but it is perhaps worth noticing that this provision was inserted in the Act of 1842 at a time when the Legislature may reasonably have supposed that its legislation was simple, clear and comprehensive. The fact that subsequent experience has brought out, and continues to bring out, difficulties and complexities, does not appear to me to justify us in construing words, which come from as far back as 1842, in such a way as has been suggested for the reason put forward.

Further, I may say that it seems to me that the section contains ample powers within itself to enable such difficulties to be surmounted. The power or the obligation of the Commissioners is one to direct the appellant to cause a valuation to be made by a person of skill. The person of skill must, of course, be instructed as to what the valuation is which he is to make, and I can find nothing in the section which would prevent the Commissioners, when they direct the appellant to cause a valuation to be made, specifying in their direction what the nature of that valuation is, and the basis on which it ought to be made. If the valuation is one which is likely to touch upon some difficult or disputed question, the Commissioners would have the assistance of the parties in framing the instructions to the person of skill. If the matter touches upon something which has two possible meanings, there is nothing to prevent the person of skill from being instructed to make his valuation upon two alternative hypotheses. The matter seems to me to be a perfectly simple thing to deal with, and if, in any case, these difficulties and doubts on questions of law are apparent, the remedy appears to me to be one which is readily available; but in the ordinary case, where no difficulties arise and there is a pure question of fact, the matter will settle itself.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Gisborne & Co., for A. Kremer, Leeds.*

J. L. D.

LONDON, MIDLAND AND SCOTTISH RAILWAY COMPANY *v.* GREAVER AND ANOTHER.

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Railway—Bye-law—Prohibition of transfer of partly used ticket—No express mention of fraudulent intent—Bye-law, whether repugnant to general law—Railways Clauses (Consolidation) Act, 1845 (8 *Vict. c.* 20), *ss.* 108, 109—*Regulation of Railways Act,* 1889 (52 *&* 53 *Vict. c.* 57), *s.* 5, *sub-s.* 3 (*a*)—*L. M. & S. Ry. Co.'s Bye-laws and Regulations, No.* 6.

The Railways Clauses (Consolidation) Act, 1845, provides by s. 108 that it shall be lawful for a railway company to make regulations for regulating the travelling upon, or using and working of the railway, and by s. 109 that for better enforcing the observance of such regulations it shall be lawful for the company " to make bye-laws . . . . provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect . . . . "

The Regulation of Railways Act, 1889, s. 5, sub-s. 3 (*a*), provides: " If any person travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof " he shall be liable to a fine.

A railway company, the greater part of whose system was in England, made the following bye-law: " 6. No person shall sell or buy or attempt to sell or buy any ticket (which expression in this bye-law includes any passenger ticket, season ticket, dog ticket, bicycle ticket, book of passenger tickets, and any portion detached from the remainder of any such ticket or book) or transfer or receive any partly used ticket or season ticket to or from any other person with intent that any person shall use the same for the purpose of travelling or conveyance upon the railway, unless the ticket shall at the time of issuing thereof purport to be transferable, and no person shall knowingly and wilfully use or attempt to use any ticket which has been sold, bought, transferred or received in contravention of this bye-law. Provided that the sale or attempted sale by or the purchase or attempted purchase from a duly authorized servant or agent of the company is excepted from the provisions of this bye-law " :—

Held, that the bye-law was not repugnant to the enactments set out above or to any other provision of the law by reason of its not expressly providing that the person selling, buying, transferring, or receiving the ticket must have done so with fraudulent intent, but that it was intra vires and valid.

Gentel v. *Rapps* [1902] 1 K. B. 160 and *Reynolds* v. *Beasley* [1919] 1 K. B. 215, applied.

CASE stated by a Metropolitan police magistrate for the opinion of the Court as to the correctness of his decision on

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two informations under bye-law 6 (1) of the Bye-laws and Regulations of the London, Midland and Scottish Railway Company, hereinafter called the appellants.

On February 16, 1936, Michael Keohane, hereinafter called the respondent Keohane, travelled on the railway of the appellants, from Manchester to Euston station, London, having purchased an excursion return ticket, which was not transferable, at the price of 10*s.* The ordinary single fare for the journey between Manchester and London on the appellants' railway was 23*s.*

On arrival at Euston station the respondent Keohane handed a partly used ticket, namely, the return half of the said excursion ticket, to Lewis Greaver, hereinafter called the respondent Greaver, who received the same.

Both respondents were guilty of fraud in that the respondent Keohane transferred the said partly used ticket to the respondent Greaver and the respondent Greaver received the same with the intent that the respondent Greaver should use the ticket for the purpose of travelling on the appellants' railway from London to Manchester without having previously paid his fare and in order to avoid the payment thereof.

The appellants preferred informations against the respondents at the Metropolitan police court at Clerkenwell under bye-law 6 of the Bye-laws and Regulations of the appellants' railway (1) against the two respondents respectively. The information against the respondent Greaver charged that he on the date and at the London station above mentioned did unlawfully receive a partly used ticket from the respondent Keohane with intent to use that ticket for the purpose of travelling on the railway contrary to that bye-law. The information against the respondent Keohane charged that he at the same time and place did unlawfully transfer a partly used ticket to the respondent Greaver with intent that he should use that ticket for the purpose of travelling on the railway contrary to that bye-law.

At the hearing of the informations the respondent Greaver did not appear but wrote a letter addressed to the Court in which he pleaded guilty. The respondent Keohane appeared and pleaded guilty.

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(1) The terms of the bye-law are set out in the headnote.

At the hearing the above-mentioned facts were proved or admitted, and were found by the magistrate.

On behalf of the appellants it was contended that each of the respondents had in the premises committed a breach of the said bye-law.

The magistrate stated his decision as follows :—" I was of opinion that the said bye-law 6 of the appellants' Bye-laws and Regulations (1) was void and ultra vires on the ground that it was repugnant to the general principles of law in that it purported to make unlawful the transfer or receipt by any person of a partly used ticket with the intent that any person should use the same for travelling upon the appellants' railway. By s. 5, sub-section 3, of the Regulation of Railways Act, 1889, it is provided ' If any person (*a*) travels or attempts to travel on a railway without having previously paid his fare and with intent to avoid payment thereof ' he shall be liable to a fine. No act or omission can be a crime unless mens rea is present, or there is express statutory provision that the act or omission is a crime without criminal intent, or it can be clearly inferred from the terms of the statute that the mere act or omission is in itself an offence. In the cases cited before me the essence of the offence created by the above sub-section is the intent to avoid payment of the fare: vide per Shearman J. in *Reynolds* v. *Beasley*. (2) The intent averred in Bye-law 6 is ' with intent that any person shall use the same (i.e., the ticket) for the purpose of travelling or conveyance upon the railway . . . . at the time of the issuing thereof.' This intent appears to me to be a lawful intent and unlike the unlawful intent which the statute makes necessary and which is found in each of the cases cited. In *Huffam* v. *North Staffordshire Ry. Co.* (3) no intent was averred and the bye-law was held to be ultra vires. It is because the bye-law before me changes the law by expressly making an intent which in itself is lawful, namely, ' the purpose of travel or conveyance upon the railway' punishable as a criminal offence, that I cannot hold it to be good. I therefore dismissed the informations."

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(1) The bye-law is set out in the headnote.

(2) [1919] 1 K. B. 215.

(3) [1894] 2 Q. B. 821.

The question for the Court was whether, upon this statement of facts, the magistrate came to a correct determination and decision in point of law.

Noel Goldie K.C. and *Clive Burt* for the appellants. The magistrate was wrong in holding that the bye-law in question, bye-law 6 of the Bye-laws and Regulations of the appellants, was ultra vires and void as being repugnant to the general provisions and principles of the law.

Even if the bye-law on its true construction purported to make unlawful the transfer or receipt by any person of a partly used ticket with the intent that any person should use it for travelling on the railway regardless of any fraudulent attempt by the recipient of the ticket to avoid payment of his fare, it was not repugnant to the general provisions of the law. The Railways Clauses (Consolidation) Act, 1845, by s. 108, empowers a railway company to make regulations "for regulating the travelling upon, or using and working of the railway," and by s. 109, for better enforcing these regulations "to make bye-laws . . . . provided that such bye-laws be not repugnant to the laws . . . ." The Regulation of Railways Act, 1889, s. 5, sub-s. 3 (*a*), re-enacting a similar provision in s. 103 of the Act of 1845, provides: "If any person travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof . . . . he shall be liable to a fine." But neither that enactment nor any other provision of the general law declares that it shall never be made an offence for a person to travel or attempt to travel on a railway without having paid his fare, even though he does so without any fraudulent intent of avoiding payment of his fare. A bye-law is not repugnant to the general law merely because it creates a new offence and says that something shall be unlawful which the general law does not say is unlawful: it is only repugnant if it makes unlawful that which the general law says is lawful: per

Channell J. in *Gentel* v. *Rapps*. (1) Therefore, as the general law does not declare that it cannot be an offence to travel on a railway without paying the fare unless one does so with fraudulent intent, the bye-law now in question is not repugnant to the general law because it does not include the words "with intent to avoid payment of his fare," or "with fraudulent intent."

Secondly, if such a bye-law cannot be valid unless it prohibits the transfer or receipt of a partly-used and non-transferable ticket "with intent to avoid payment of the fare" or "with intent to defraud," then it is submitted that it ought to be construed as if it contained such words even although they are not expressed. The bye-law in question by providing that no person shall buy or attempt to buy, or receive, any ticket from any other person, and by adding in a proviso thereto that a purchase from a servant or agent of the company is excepted from the bye-law, is substantially similar in effect to s. 5, sub-s. 3 (*a*), of the Act of 1889, and must be construed, like that enactment, as meaning that no person shall acquire a ticket without having paid the fare to the railway company or its servant or agent: see *Reynolds* v. *Beasley* (2); and therefore as meaning by implication that any one who acquires a ticket otherwise than by paying the fare to the railway company acquires it with the fraudulent intention of avoiding payment of the fare. In *Langdon* v. *Howells* (3), where a tourist return ticket between two stations had been taken, and at an intermediate station the respondent in that case purchased from the taker the forward half of the ticket and used it to the end of the forward journey, it was held that the respondent was liable to be convicted under s. 103 of the Act of 1845 for travelling without having paid his fare with intent to avoid payment thereof. It is submitted that the bye-law here under consideration is the same in effect as that section, and that, as the facts of the two cases are very similar, the decision in that case governs the present case. The cases of *Huffam* v. *North Staffordshire*

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(1) [1902] 1 K. B. 160.
(2) [1919] 1 K. B. 215.
(3) (1879) 4 Q. B. D. 337.

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Ry. Co. (1) and *London Passenger Transport Board* v. *Sumner* (2) are distinguishable, because in each of these cases the acts which the bye-law prohibited were acts involving fraud, and the evidence showed that the passenger had not been guilty of fraud.

Neither of the respondents was represented or appeared.

Lord Hewart C.J. This is a case stated by one of the learned magistrates of the police courts of the metropolis. It arises from informations preferred by the London, Midland and Scottish Railway Company under bye-law 6 of their Bye-laws and Regulations.

One information was that one of the respondents on a day in February of this year at Euston railway station did unlawfully receive a partly used ticket from the other respondent with intent to use that ticket for the purpose of travelling on the railway contrary to that bye-law. The other information charged the other respondent on the same day with unlawfully transferring a partly used ticket to the first-named respondent with intent that he should use it contrary to the same bye-law. The magistrate, having heard the informations, dismissed them; and the question is whether in so doing he came to a correct determination in point of law.

Upon the facts of the case there was no dispute. [His Lordship stated the facts as above set out, and continued:] On the facts of the case, therefore, it is obvious that there was a fraudulent intention, but the question before the magistrate was not whether there was such an intention, but whether the prosecution was good under bye-law 6 of the appellants' Bye-laws and Regulations, and if it was not good under that bye-law then it matters not that it would be good under some other provision of the law.

If I follow aright the learned magistrate's very careful statement of his views, the difficulty of the case, in his opinion, amounts to this, that this bye-law, although aptly framed to cover a case of fraud, was at the same time so wide in its terms as to cover cases in which no element of fraud appeared,

(1) [1894] 2 Q. B. 821.

(2) [1935] W. N. 196.

and for that reason he came to the conclusion that the bye-law was too wide and was ultra vires. He came to that conclusion, be it observed, notwithstanding that on the facts of the particular case before him he was satisfied that there was a fraudulent act. This case, therefore, raises, with reference indeed to its particular facts, but not solely with reference to them, the question of the validity of this bye-law. The bye-law is framed under the Railways Clauses (Consolidation) Act, 1845, s. 108 of which provides that it shall be lawful for the company from time to time to make regulations for a series of purposes which are enumerated, " and, generally, for regulating the travelling upon, or using and working of the railway." It is said that the bye-law here under consideration was a bye-law within that section because it was a bye-law for regulating the travelling upon the railway. Such bye-laws, however, are subject to the provisions of s. 109 of the statute which contains this proviso : " provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect."

What exactly is this bye-law ? It consists manifestly of various parts and is dealing with transactions of more than one kind. First, it deals with selling or buying or attempting to sell or buy any ticket, then it goes on to deal with transferring or receiving any partly used ticket or any season ticket, and those acts are dealt with not simpliciter but where they are done with intent that any person shall use the ticket for the purpose of travelling or conveyance upon the railway ; and then follow words of exception which, in my opinion, apply to each one of the verbs which have gone before, " unless the ticket shall at the time of issuing thereof purport to be transferable." A proviso follows which seems to throw a clear light upon the purpose and function of the bye-law as a whole : " Provided that the sale or attempted sale by or the purchase or attempted purchase from a duly authorised servant or agent of the company is excepted from the provisions of this bye-law." In other words, as it seems to me, the bye-law is seeking to prohibit the sale of railway tickets by any one who is not a duly authorized servant or agent of the company, or the purchase of railway tickets from any one who is not a duly authorized servant or agent of the company. Looking at the bye-law in that way, I think it deals with these acts, selling or buying or attempting to sell or to buy any ticket and, again, transferring or receiving any partly used ticket or any season ticket, always with the intent that a person shall use the same for the purpose of travelling upon the railway. Having prohibited those acts, the bye-law goes on to provide that "no person shall knowingly and wilfully use or attempt to use any ticket which has been sold, bought, transferred or received in contravention of this bye-law." The bye-law, therefore, is dealing with non-transferable tickets and it is dealing with those tickets where they are being sold by or bought from persons not duly authorized as agents of the company.

It is said that the bye-law throws the net too wide and is invalid as being ultra vires. In my opinion, it undoubtedly does throw the net very wide indeed, but I am not prepared to say that the magistrate was right in holding that it was ultra vires. A good deal of light, I think, is thrown upon the matter by the provisions of the Regulation of Railways Act, 1889. By s. 5, sub-s. 3, of that Act it is expressly provided: "If any person (*a*) travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof" he shall be guilty of an offence; and I cannot doubt in this particular case that, if these informations had been laid under that section, a conviction must have followed upon the finding that both respondents were guilty of fraud. But what does that section mean? It has been judicially interpreted and it is established now that the words "without having previously paid his fare" mean without having paid his fare to the railway company or to a duly authorized servant or agent of the railway company. (1) In other words, it is an offence under the statute of 1889 to travel or attempt to travel on a railway without having previously paid the fare to the railway company or to an agent of the railway company. That provision seems to me to throw light upon this bye-law. The bye-law, it may be, was founded in relation to that provision, but, however that may be, they co-exist, and in my opinion this bye-law represents a very careful endeavour on the part of the railway company to prevent the sale of railway tickets by a person who is not a duly authorized servant or agent and to prevent the purchase of a ticket from any one who is not a duly authorized servant or agent. Why? Because, I imagine, in ninety-nine cases out of a hundred, whatever the exceptions may be, transactions in railway tickets, not taking place between the person concerned and the railway company or its agent, are transactions for the purpose of avoiding either payment of the fare or, what is the same thing except in degree, payment of some proper part of the fare; it is to prevent the buying and selling of railway tickets upon terms which will prevent the railway company from getting its fair and proper payment. A sum which is not paid to the company or its agent cannot be a fare, and a person who intends to travel with a ticket bought otherwise than from a servant of the company is intending to travel without paying his fare.

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(1) *Reynolds* v. *Beasley* [1919] 1 K. B. 215.

Looking at the matter in that way, I think that this bye-law can be supported. It is to be observed that, although the words "sell," "buy," "attempt to sell or buy," "transfer or receive" are very wide words, they are limited in this bye-law in the sense which I have indicated; the intent is set out, and the exceptions are referred to. So, for example, the case which at first blush occurs to the mind, that in which a man buys a ticket for another person for convenience, does not really come within the bye-law, because in that case the purchaser would purchase as the agent of the recipient. Here the bye-law was invoked in order to deal with a transaction in the partly used ticket and there the opportunities of fraud seem to me to be perfectly obvious. Whether what is being dealt with is an excursion ticket, or a workman's ticket, or a season ticket, there is manifestly a strong motive on the part of some persons to purchase a return half, in order to avoid making to the railway company the full payment which would otherwise have to be made.

Our attention has been very properly directed to the case of *Gentel* v. *Rapps* (1), which was a case of a bye-law relating to a nuisance upon a tramway-car, where it was held that the bye-law, which prohibited swearing and using offensive language upon a tramway car, was good, although the bye-law did not add the words "so as to be a nuisance or annoyance to others." In that case Channell J. said, "I think that the recent cases"—he was speaking in 1901—"have clearly settled that, where an authority, or body of persons have been given power to make bye-laws for the preventing of nuisances, they have also power to declare that particular things, if capable of being nuisances, are when done in their district nuisances. The very power which is given to them involves their having authority to say what, in particular places and in particular circumstances, shall be nuisances. I do not think they need add to their bye-law words such as 'so as to be a nuisance or annoyance to other persons.' There are obvious reasons why words of that kind should not be added, except, possibly, where the bye-law applies to a very large area; so that what is a nuisance in one part of it may possibly not be so in another. On the question of repugnancy I repeat what I have said before. A bye-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land." (2) There is no element in the general law which says that the purchase or sale of railway tickets other than purchase or sale where the other party is a duly authorized servant or agent of the company is lawful, and it seems to me that this bye-law is valid in restricting the sale and transfer of non-transferable tickets to duly authorized servants and agents of the company because, although one can conceive an individual exception, the purpose of transactions of this sort must in general be fraudulent. The case of hardship is suggested where a person through no fault of his own is

(1) [1902] 1 K. B. 160.

(2) [1902] 1 K. B. 165.

prevented from using the return half of his ticket and in good faith transfers it, although it is marked non-transferable, to somebody else. But there is no real hardship because that person, if he is really prevented from using the return half of his ticket, can send it back to the railway company and recover from the railway company what was due to him upon it and purchase another ticket.

Perhaps it is unfortunate that the appearance of guilt is here so manifest, because that fact rather tends to colour the way in which the bye-law is to be regarded. In view of that fact I cannot understand why the prosecution did not take place under s. 5, sub-s. 3, of the Act of 1889, instead of under the bye-law. If it had taken place under that sub-section the question would not have been arguable. Nevertheless, I am satisfied that the magistrate was wrong in questioning the validity of the bye-law. I think, therefore, that this appeal ought to be allowed and that the case ought to go back to the magistrate with a direction to find that the offence which was charged was proved.

Swift J. I concur in the view that this bye-law is valid for the reasons given by my Lord, and I do not wish to add anything. I agree that the case must go back again for a conviction to be recorded.

du Parcq J. I also agree and I desire to add only a few words.

The learned magistrate was right, I think, to be vigilant in a case of this kind and to consider this bye-law, which is certainly very wide in its terms, carefully, although the defendants were not legally represented and were not themselves in a position to argue points of law. But I think, having considered the matter carefully, that the magistrate took a wrong view, and it is not difficult, now that we have had the assistance of counsel and considered the matter afresh, to see what the error was. The question which the magistrate properly considered was whether this bye-law was repugnant to the general principles of law. The general law of the land is to be found in statutes as well as in the decisions which have made up the common law and the magistrate's attention was called to s. 5, sub-s. 3, of the Regulation of Railways Act, 1889. That provision, as my Lord has already pointed out, makes it an offence to travel without having previously paid one's fare and with intent to avoid payment thereof. By the decision of this Court in *Reynolds* v. *Beasley* (1) it has been made clear that "paid his fare" means paid his fare to the railway company, and a man who pays what cannot properly be called his fare but an amount which may be equivalent to the fare, not to the railway company but to somebody else, has not "paid his fare." If he travels with intent to avoid payment of the fare to the railway company, or to an authorized agent of the railway company, though he may have paid an amount equivalent to the fare to somebody else who has no authority to receive it, then, as I understand the decision in *Reynolds* v. *Beasley* (1), he will have committed an offence. It may not be an offence which would strike anybody as a very grave moral offence, or it may. The view taken of it will depend upon the circumstances. The magistrate said that in the sub-section to which I have just referred the intent is to avoid payment of the fare, but he went on to say, that in bye-law 6, the bye-law we are now considering, the intent was to use the ticket "for the purpose of travelling or conveyance upon the railway at the time of the issuing thereof," and, said the magistrate, "this intent appears to me to be a lawful intent." There, I think, with all due respect, the learned magistrate fell into error. Of course, an intent to travel upon a railway is a lawful intent and the railway company would be the last people to argue to the contrary, but what the bye-law aims at, as is obvious from its terms, is travelling upon the railway with a ticket the price of which has not been paid to the railway company, so that the person using it has not paid his fare. When that is borne in mind, it appears to me that the intent referred to in bye-law 6 is, in substance, precisely the same as the intent mentioned

(1) [1919] 1 K. B. 215.

in s. 5, sub-s. 3, of the Act of 1889, when one remembers the construction of that section which has already been put upon it by this Court.

I think, therefore, that the magistrate was wrong in saying that there is anything repugnant to the general law in this bye-law. On the contrary, it seems to me to be consonant with the section of the Act to which I have referred, for the reasons which I have suggested and for the further reasons which were given by my Lord in his judgment.

Appeal allowed.

Solicitor for appellants: *Alexander Eddy.*

J. R.

1936
Oct. 27.

WURZEL *v.* HOUGHTON MAIN HOME DELIVERY SERVICE, LIMITED.

WURZEL *v.* ATKINSON AND OTHERS.

Road traffic—Motor vehicle—Private carrier's licence—Condition that vehicle be not used for carriage of goods for hire or reward—Vehicle of incorporated society used for carriage of goods to members—Vehicle of unincorporated society used for similar purpose—User, whether in accordance with Act—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 2, *sub-ss.* 1 (*c*), 4; *s.* 9.

The Road and Rail Traffic Act, 1933, s. 2, sub-s. 4, provides: " A private carrier's licence (in this Part of this Act referred to as ' a C licence ') shall entitle the holder thereof to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by him, subject to the condition that no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward . . . ."

An incorporated society, whose members consisted exclusively of persons employed at a colliery, had as its object the business of delivering to its members coal supplied to them from the colliery by the colliery company. For the purposes of its business the society owned a motor goods vehicle in respect of which it held " a C licence " under the above sub-section. The society used the vehicle for making a delivery of coal at the house of one of its members, the charge for the delivery being deducted from the wage of the member payable by the colliery company and subsequently paid by that company to the society. On an information against the society for having failed to comply with the condition, to which the licence was subject under the above sub-section, by using the vehicle for the carriage of goods for hire or reward :—

Held, that, as the society was incorporated, it was a legal entity separate and distinct from its individual members; and consequently that in using the vehicle for the carriage of coal to one of the members at a charge, it used the vehicle for " the carriage of goods for hire or reward " within the meaning of the sub-section and was guilty of the offence with which it was charged.

In another case in which the material circumstances were in all respects similar to those above mentioned, except that the society which carried on the business and owned the vehicle and against which the information was laid, was an unincorporated society : —

Held, that, as the society was unincorporated, it had no separate existence apart from its individual members who were themselves the owners of the vehicle and the recipients of the payments made for the use of it; and consequently that when the vehicle was used for the carriage of coal to the member it was not used for " the carriage of goods for hire or reward " within the meaning of the sub-section, and that the society was not guilty of the offence charged against it.

Graff v. *Evans* (1882) 8 Q. B. D. 373, applied.

Newell v. *Hemingway* (1888) 60 L. T. 544, disapproved.

TWO CASES stated by justices for the West Riding of the County of York.

In the first of these cases stated the facts were as follows :—

The Houghton Main Home Coal Delivery Service, Ld. (therein called "the respondent society"), was an incorporated company, and was registered under the Industrial and Provident Societies Act, 1893, and its objects, as set out in its Rules, were to carry on the industries, businesses or trades of haulage and carting contractors and motor proprietors by providing for its members the delivery of home coal supplies from the Houghton Main Colliery (hereinafter called "the colliery"), and for the purpose of affording transport facilities for the conveyance of its members to and from work at the colliery.

The Rules of the respondent society provided (inter alia) that :—

(i.) All persons employed at the colliery who are entitled to home coal supplies shall be eligible for membership.

(ii.) Every member shall hold at least one share, but no member (other than a registered society under the Industrial and Provident Societies Act, 1893) shall hold an interest exceeding one shilling in the shares of the society.

(iii.) No member shall hold more than one share and no interest or dividend shall be paid thereon. Shares shall not be transferable nor withdrawable and a member shall forfeit the value of his share on ceasing to be a member.

(iv.) Except by the dissolution of the society or in the necessary purposes of the society's maintenance, no profits or funds shall be distributed among the members.

The activities of the respondent society were confined to the delivery to the members of coal supplied to the members from the colliery by the owners thereof, namely Houghton Main Colliery, Ld. (therein called "the colliery company"). The prices charged by the respondent society to its members for such deliveries of coal were, by arrangement, deducted or stopped from the wages of the members payable by the colliery company and subsequently paid over by the colliery company to the respondent society.

The only members of the respondent society were the persons employed by the colliery company, who were entitled to house coal supplies, all of whom were shareholders in the respondent society, which had no other shareholders whatever.

The respondent society was formed as an unincorporated society in 1921 and was registered under the Industrial and Provident Societies Act, 1893, in 1927. The respondent society originally employed a contractor to deliver coal to its members, but subsequently bought out the contractor. The income of the respondent society was disbursed on wages and other expenses and in reducing the cost of coal deliveries, which had in fact been reduced from an average of 5*s.* 8½*d.* per load in 1926 to 2*s.* 3½*d.* per load in 1936. Sometimes the respondent society delivered coal free of all charge to its members who were ill or out of work, but no deliveries were made in any circumstances to non-members.

The respondent society was (inter alia) the owner of two motor goods vehicles in respect of which they held a " C " licence within the meaning of the Road and Rail Traffic Act, 1933, authorizing them to use the said vehicles subject to the conditions printed on the licence. By condition No. 1 of these conditions it was provided: " In accordance with s. 2 (4.) of the Act:—The holder of this licence is entitled to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by him, but no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward."

On January 2, 1936, a police officer on duty at Snape Hill Road, Darfield, saw the respondent society's said motor goods vehicles delivering coal at the respective houses of one Robert Randerson and one John Henry Bernard Podmore. The said Randerson and the said Podmore, who were employed at the colliery, were members of the respondent society, each holding one 1*s.* share therein. The 1*s.* subscription of each of these members was paid by the colliery company deducting or stopping the amount from their wages and paying it to the respondent society. In respect of the said deliveries of coal sums of 2*s.* 1*d.* were deducted or stopped by the colliery company from the wages of both Randerson and Podmore, which sums were subsequently paid by the colliery company to the respondent society.

At a court of summary jurisdiction sitting at Barnsley, West Riding, an information was preferred by Joseph Wurzel (thereinafter called "the appellant"), under the Road and Rail Traffic Act, 1933, against the respondent society for that they on January 2, 1936, in the parish of Darfield in the County of York, being the holders of a "C" licence within the meaning of that Act, did fail to comply with condition No. 1 of the conditions attached to that licence, inasmuch as on the said day they did use a vehicle (being one of the two vehicles above referred to) authorized under the said licence, for the carriage of goods, to wit, a quantity of coal, for hire or reward on a road there situate called Snape Hill Road contrary to s. 9 of the Act.

At the same court another information was preferred by the appellant against the respondent society which was in all respects similar to the information above mentioned except that it related to the other vehicle.

On March 25, 1936, the informations were heard by the justices.

On behalf of the respondent society it was contended that:—

(*a*) The respondent society was not guilty of the offences charged.

(*b*) The payments made by or on behalf of Randerson and Podmore for deliveries of coal by the respondent society did not constitute "hire or reward" because Randerson and Podmore were members of the respondent society; and the accumulated profits of the respondent society, whilst being available for reducing the average cost of delivery of such coal, remained with the respondent society by its rules for the ultimate advantage of its members.

(*c*) Although the respondent society had taken out a "C" licence, no licence need have been taken out, because the said motor goods vehicles were the property of the members of the respondent society and were being used for the delivery of coal only to members. Alternatively if any licence was required the appropriate licence was a " C " licence, because if it were to be held that the vehicles were used for or in connection with any trade or business carried on by the respondent society, i.e., that of the carriage under the circumstances hereinbefore set out of its members' coal only, such vehicles, nevertheless, were not used for the carriage of goods for hire or reward.

(*d*) Sect. 26 of the Road Traffic Act, 1934, had been specially passed to cover public service vehicles, and there was no corresponding section in the Road and Rail Traffic Act, 1933, or in any subsequent amending legislation; the words " notwithstanding any rule of law " in s. 26 implied that there was such a rule of law still operative with regard to " goods vehicles," and that a society, such as the respondent society, did not carry on its operations for " hire or reward."

(*e*) The fact that the respondent society was a legal entity apart from its members and was the owner of the said motor goods vehicles did not constitute the payments made as aforesaid payments for "hire or reward" as every member was a shareholder and every shareholder a member of the respondent society.

On behalf of the appellant it was contended that :—

(*a*) The respondent society was guilty of the offences charged.

(*b*) The respondent society was a legal entity apart from its members and was the owner of the said motor goods vehicles; and the said coal was being carried by the respondent society in its capacity as haulage and carting contractors and that it was paid by Randerson and Podmore for such carriage.

(*c*) The ultimate disposal of the accumulated payments for and consequential profits of the said deliveries of coal by the respondent society, although restricted in method of distribution by the rules, did not obviate the fact that the coal was being carried for hire or reward, nor did the fact that the members of the respondent society had a proprietary interest in the assets thereof affect the fact that the user of the said vehicles was " for hire or reward."

(*d*) The actual user of the vehicle was the criterion as to whether the same should be licensed and as to how it should be licensed, and the method of disposal of the "rewards" thus obtained was not the deciding factor.

(*e*) Sect. 26 of the Road Traffic Act, 1934, was merely a declaratory section and did not justify the inference that the omission of a similar section as regards "goods vehicles" was proof of the fact that societies, such as the respondent society, carrying goods in the circumstances of the present case were not carrying the same "for hire or reward."

The justices being of the opinion that the contentions on behalf of the respondent society were correct dismissed the informations.

In the second of the cases stated James Atkinson, Walter Norfolk and James Ward, the respondents, were members of, and traded as, the Dearne Valley Home Coal Delivery Service, an unincorporated society therein called "the society," membership of which was restricted to persons employed at the Dearne Valley Colliery, the owners of which were the Dearne Valley Colliery Company, Ld. The sole business of the society was to deliver to its members coal supplied to them from the colliery by the colliery company. The initial fee of 1*s.* payable for membership of the society and the price charged by the society to each member for delivery of coal were, by arrangement, deducted or stopped from the wages of the member payable by the colliery company and subsequently paid over by the colliery company to the society. No deliveries of coal were made by the society to non-members.

The society was the owner (inter alia) of a motor goods vehicle in respect of which the respondents, on behalf of the society, were the holders of a "C" licence having conditions printed on it, including condition No. 1, which licence and conditions were similar to those mentioned in the first case.

In July, 1935, in response to the application of the society for the "C" licence, the licensing authority stated that, in the case of a society which was not a body corporate, as it was impracticable to show on the licence the names of all members of the society it would meet the case if the society nominated one or more members, preferably not more than three, who would be responsible for the proper operation of the service and the observance of the conditions of the licence. In pursuance of that request the society nominated the respondents for that purpose.

On January 4, 1936, a police officer on duty at Edward Street, Darfield, saw the said motor goods vehicle delivering a load of coal at the house of one Frederick Charles Stanley, who was employed at the colliery and was a member of the society. In respect of that delivery of coal, the sum of 3*s.* 9*d.* was deducted or stopped by the colliery company from the wages of the said Stanley and subsequently paid by the colliery company to the respondent Atkinson as secretary of the society.

Wurzel, the appellant, preferred an information under the Act of 1933 against the three respondents for having used the said vehicle for the carriage of goods for hire or reward contrary to s. 9 of the Act, and that information was heard at the same court and on the same date as those mentioned in the first case.

The contentions on behalf of the respondents and the appellants respectively were substantially similar to those in the first case.

In this case also the justices accepted the contentions on behalf of the respondents and dismissed the information.

Valentine Holmes for the appellant: The decision of the justices was wrong in each of the two cases under appeal.

In each case the respondents, who owned a vehicle in respect of which they held a "C" licence under the Road and Rail Traffic Act, 1933, s. 2, failed to comply with the condition subject to which the licence is granted under sub-s. 4 of that section, namely, the condition that the authorized vehicle shall not be used for the carriage of goods for hire or reward, and thus committed the offence with which they were charged under s. 9 of the Act. In each case the member of the society for whom the coal was carried at his cost had, no doubt, some interest in the vehicle, but that interest was not sufficient to prevent him from being a separate person from the society, or the vehicle from being used for the carriage of the coal for hire or reward. The only distinction between the two cases is that in the first case the society which owned the vehicle was an incorporated society, while in the second case the society was an unincorporated society consisting of a number of separate individuals; but for the purpose of these cases that is an immaterial distinction. The Road Traffic Act, 1934, s. 26, provides that where under a transaction between a member of a society on the one hand and the society or another member thereof on the other hand, a person is carried as a passenger in a motor vehicle he shall be deemed to be carried for hire or reward; and the term "society" is there declared to mean any association of persons whether incorporated or not. Similarly, in either of the present cases, whether that of the incorporated or that of the unincorporated society, in which under a transaction between a member of the society and the society or another member thereof goods were carried in a vehicle, they should be deemed to have been carried for hire or reward.

N. R. Fox-Andrews for the respondents: The justices rightly dismissed the informations in both these cases.

In neither case did the respondents use the vehicle for the carriage of goods for hire or reward in breach of the condition to which a "C" licence under the Road and Rail Traffic Act, 1933, is made subject by s. 2, sub-s. 4, of the Act. (1) In order that there may be a carriage of goods for hire or reward within the meaning of that sub-section there must be a contract for the carriage of goods for hire or reward between two persons, one owning the vehicle and the other engaging it to carry goods for hire or reward. In neither of the present cases were there two separate parties who could enter into a contract with each other for the carriage of goods for hire or reward.

To begin with the second case, that, namely, of the unincorporated society, it is clear that in that case there were

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(1) The sub-section so far as material is set out in the headnote.

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not two parties who could enter into such a contract. As an unincorporated society is indistinguishable in law from the individuals who compose it, and as its property is their property, there could be no legal contract between this society and one of its members for the carriage of goods for hire or reward in a vehicle belonging to the society, inasmuch as a person cannot contract with himself. This unincorporated society resembles a partnership, and it seems clear that if a partnership owned a vehicle and used it for the conveyance of goods to the house of a partner who handed the cost of carriage to the partnership in which he was himself a partner, it could not be said that the vehicle had been used for the carriage of goods for hire or reward. This society is exactly analogous to a members' club, in regard to which it has been held that where the manager of the club supplied intoxicating liquor to a member who paid for it, he did not "sell" the liquor to the member within the meaning of s. 3 of the Licensing Act, 1872: *Graff* v. *Evans.* (1)

The case of the incorporated society is somewhat different, for it cannot be denied that that society is a person distinct in law from the individual members of whom it is composed. It does not, however, follow that the society's vehicle, in being employed to deliver coal to a member at a charge, was used for the carriage of goods for hire or reward within the meaning of the sub-section. In the case of *Newell* v. *Hemingway* (2) it was held that where an incorporated club had all the characteristics of a members' club, that is to say, where every member was a shareholder and every shareholder a member, the supply of intoxicating liquor by the club to a member for payment was not a sale of liquor by the club to the member within the meaning of the Licensing Acts. It appears from the constitution and rules of this incorporated society, which are sufficiently set out in the case stated, that the society has all the characteristics of a members' club, so that its vehicles were the property of the members themselves, and, when they were used for the carriage of goods for a member at a charge, they were used by the member himself for his

(1) 8 Q. B. D. 373.

(2) 60 L. T. 544.

own benefit, and, therefore, were not used for the carriage of goods for hire or reward.

The Road Traffic Act, 1934, s. 26, provides that where, under a transaction effected between a member of a society and the society, a person is carried as a passenger in a vehicle in such circumstances that he would be deemed to be carried for hire or reward if the transaction were effected otherwise, then, notwithstanding any rule of law, he shall be deemed to be carried for hire or reward; and that in the section "society" means any association whether incorporated or not. As there is no corresponding provision in regard to a transaction for the carriage of goods for hire or reward, it may be inferred from that section that in the case of such a transaction there is a rule of law that the vehicle is to be deemed not to be used for the carriage of goods for hire or reward.

Valentine Holmes in reply: The cases of *Graff* v. *Evans* (1) and *Newell* v. *Hemingway* (2) have no application to the present cases. Decisions that the supply by a members' club of intoxicating liquor to a member for payment is not a sale of liquor to the member within the meaning of the Licensing Acts, are no authority for holding that the use of the vehicles of these societies for the carriage of goods to members is not a carriage of goods for hire or reward within s. 2, sub-s. 4, of the Act of 1933. In the present cases the societies were separate persons from their members, and there were contracts for the carriage of goods for hire or reward between the society and the member.

LORD HEWART C.J. These are two special cases stated by justices for the West Riding of Yorkshire and heard together for convenience. The questions which they involve arise under the Road and Rail Traffic Act, 1933. Shortly the point was, in the one case as in the other, whether the respondents, being the owners of a motor goods vehicle in respect of which they were the holders of a "C" licence, that is to say a licence of the kind referred to in s. 2, sub-s. 1 (*c*), of the Act of 1933, failed to comply with a condition attached to that licence

(1) 8 Q. B. D. 373.

(2) 60 L. T. 544.

—namely, a condition that the holders were entitled to use the vehicle for the carriage of goods for or in connection with any trade or business carried on by them, but not to use any vehicle so authorized for the carriage of goods for hire or reward. Those words appear in s. 2, sub-s. 4, of the Act of 1933, which provides as follows: "A private carrier's licence (in this Part of this Act referred to as a 'C' licence) shall entitle the holder thereof to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by him, subject to the condition that no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward."

In each of these cases it was contended that the respondents had contravened the statute by using, for the carriage of goods for hire or reward, vehicles of this nature licensed with a "C" licence. The justices came to the conclusion in both cases that no offence had been committed and dismissed the informations. The question for this Court is whether in so deciding they came to a correct determination in point of law.

It may be convenient to deal first with the case which stands first in the list, that, namely, in which the respondents are a limited company. [His Lordship stated the facts and the contentions of the parties relating to that case as set forth in the first of the above cases stated, and continued :] It seems to me that the contentions which were then urged and which have been repeated to-day on behalf of the appellant were right. In my opinion the controlling fact is that this respondent society was, and is, a legal entity apart from its members. When a vehicle belonging to the limited company was employed for the purpose of making a delivery of coal at the house of an individual member for a charge it was being used for the carriage of goods for hire or reward. It matters not that the payment to be made, which we are told is in proportion to the distance travelled, was not made directly in cash by the member to the limited company, but was deducted or stopped by his employers, the colliery company, and then passed on to the respondent society. It seems to me that it is a fact, not merely of some, but of governing importance that there was a limited company, a legal entity apart from the members who held its shares.

Conversely in the second case there was no limited company. The information there was against certain individuals named as respondents and described as trading as Dearne Valley Home Coal Delivery Service. In no material respect do the facts of that case differ from the facts of the first case, except that here there was no limited company. There was a collection of individuals rather of the nature of a club, who joined together and purchased motor vehicles and used them for the purposes already described. Here it was held that no offence had been committed, the contentions of the respondents being upheld. The appellant argues that the fact that the members of the society had a proprietary right in the assets would not prevent the user of the vehicle from being for hire or reward. It seems to me that where we are dealing not with a transaction between a shareholder and a limited company but between one member of an unincorporated society and his fellow members different considerations apply.

Our attention has been directed to a case which is not in pari materia, but which is nevertheless useful as throwing light upon the matter, namely the case of *Graff* v. *Evans* (1), where the manager of a bona fide club was prosecuted for selling by retail intoxicating liquors within the meaning of s. 3 of the Licensing Act, 1872, and was held not to be selling by retail intoxicating liquors. It is quite true that there are manifest differences between selling liquor by retail and carrying goods for hire or reward, and yet there are some things which may be said to be common to both. Field J., in giving judgment in that case, said: "In construing a statute like the present, by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offence within the section. It is not disputed that the club was bona fide a club." (2) Then he goes on to say: "I am unable to follow the reasoning of the learned magistrate in saying that the question depends upon whether

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(1) 8 Q. B. D. 373.

(2) Ibid. 377.

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or not a profit was made upon the sale of the liquors. It appears to me immaterial whether the sum a member pays for the liquor is equal to or more or less than the cost price. The transaction does not become the more or the less a sale on that account. It cannot be the true view that if the member pays a sum exactly equal to the cost price there is no sale within the section, but that if he pays more than the cost price there is. The section must be construed by looking at the language used, and taking a large view of the object of the legislation." (1) Finally, Field J. said: "The question here is, Did Graff, the manager, who supplied the liquors to Foster, effect a 'sale' by retail? I think not. I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price." (1)

In like manner in the second of the cases now before the Court it seems to me that the persons at whose houses the coal was being delivered were among the owners of the motor vehicles which were making the delivery, and to say that they were having their coal carried in those vehicles for hire or reward involves a proposition that they were hiring from themselves and rewarding themselves, a difficult conception.

It was part of the argument for the respondents that under the Act of 1934 a certain section had been enacted in order to bring within the net persons who were carried as passengers on motor vehicles. That section is s. 26 of the Road Traffic Act, 1934, and it provides as follows: "Where, under a transaction effected by or on behalf of a member of a society on the one hand and the society or another member thereof on the other hand, a person is carried as a passenger in a motor vehicle in such circumstances that he would be deemed to be carried for hire or reward if the transaction were effected otherwise than as aforesaid, then, notwithstanding any rule of law, he shall for the purposes of the principal Act and of this Act be deemed to be carried for hire or reward," and the section goes on to add these words: "In this section the expression ' society ' means any association of persons whether incorporated or not." It seems to be argued with force that it required a section of a statute to cause liability to exist in those circumstances, and I think there is weight in the argument that if the Legislature, when it was dealing with arrangements between members of societies for carriage of persons in motor vehicles, had been minded to deal with the topic of carriage of goods apparently for hire or reward in motor vehicles belonging to societies and making deliveries to members of societies, nothing would have been easier than to insert a few words to accomplish the purpose. It looks as if the topic, as a topic, had been before the Legislature, and the Legislature, for some reasons not difficult perhaps to imagine, had decided to exclude from the provisions of the Act the carriage of goods in such circumstances as are here revealed, while it brought within the Act by express words the carriage of persons.

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(1) 8 Q. B. D. 378.

I will only add that if the argument which is urged on behalf of the appellant in this case were to prevail, the consequences would be rather odd in relation to associations of partnership. Where, it might be asked, is the line to be drawn ? Here no doubt in the case of this unincorporated association there are many members, but in point of reason it seems difficult to think that that can make any real difference. Suppose there had been two members and two only, and suppose they had been called partners, could it, except for controversial purposes, have been argued that one partner was hiring the vehicle from the other partner or from the partnership when it was being used to deliver coal at his house, and vice versa with regard to his co-partner when it was being used for a similar purpose at his house ? I think that the ingenious argument which has been put forward on behalf of the appellant in that particular case is capable of reductio ad absurdum.

In the result, therefore, I think that in the case where the limited company is concerned the appeal ought to be allowed and the case should go back to the justices with a direction to find that the offence which was charged was proved, while in the other case I think that the true conclusion is that the appeal ought to be dismissed.

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SWIFT J. I agree. I think that the difference between these two cases solves the problem which has been put before the Court. In the one case the owner of the vehicle, which was used for the purpose of transporting coal, was a limited liability company, a legal entity, which owned and controlled and could let out on hire or refuse to let out on hire the vehicle which is said to have been used for hire or reward in this case. In the other case, the vehicle which was in question was owned by all the members of a combination of workers in the Dearne Valley Coal Mine. The body was an unincorporated society and each member was entitled to use in his turn the vehicle for his purpose, making such a contribution to its expenses as was agreed upon with his fellow members. It seems to me that the second case comes within the principles of law laid down in *Graff* v. *Evans* (1), though, of course, the facts of the two cases are quite different. I want to add only one word more. An attempt was made by Mr. Fox-Andrews to bring the case of the limited company under the same principle, and in making it he relied upon a case of *Newell* v. *Hemingway*. (2) I do not think that in that case sufficient attention was paid to the difference which exists between a proprietary club and a members' club. Lord Coleridge C.J., in giving judgment, seemed to think that the case was covered by *Graff* v. *Evans* (1), whereas in truth it was an entirely different case, for there the purchase was not from the common stock of the members, as it was in *Graff* v. *Evans* (1), but from the limited company which owned the club. I do not think that that case is in any way binding upon us in regard to this matter. In my opinion these two informations which were before the justices should be dealt with as my Lord has said.

DU PARCQ J. I agree with regard to both the cases before us, and I cannot usefully add anything to what has been said already.

First appeal allowed.
Second appeal dismissed.

Solicitor for the appellant: *The Treasury Solicitor.*
Solicitors for the respondents: *J. S. & P. Walsh, Leeds.*

(1) 8 Q. B. D. 373. (2) 60 L. T. 544.

J. R.

STAFFORD *v.* KIDD.

1936
Dec. 9.

Bastardy—Child of married woman—Execution of deed of separation—Subsequent conception of child during husband's life—Presumption of legitimacy.

The execution of a deed of separation, together with evidence that it was acted upon by the parties, is sufficient to rebut the legal presumption of access and of the legitimacy of a child born during marriage, in the case of a child conceived during a period when the spouses are living apart under the deed.

Mart v. *Mart* [1926] P. 24, followed.

In re Bromage [1935] Ch. 605, not followed.

CASE stated by Sunderland justices.

At a court of summary jurisdiction holden at Sunderland, the appellant, Ann Stafford, a poor person, preferred a complaint that on March 10, 1936, she had been delivered of a male bastard child, and that the respondent, William Kidd, was the father.

The appellant married one Kellet Stafford on May 12, 1922, and he was still living. In November, 1934, they separated, and on November 14, 1934, they signed a deed of separation, in which it was set out that the parties " have mutually agreed to live separate and apart from each other." It was further agreed " that the wife shall henceforth be free from the control and authority of her husband and shall reside in such place and in such manner as she shall think fit (so long as she shall live a chaste life) without interference or molestation of her husband." On December 13, 1935, the husband, at Newcastle-upon-Tyne assizes, filed a petition for divorce from the appellant, naming Kidd, the present respondent, as co-respondent, and, the suit being undefended, a decree nisi was granted on June 17, 1936. At no time during the divorce proceedings was the said child mentioned.

On the bastardy application some independent evidence of non-access by the husband was given on behalf of the appellant, the wife, but the justices found as a fact that non-access had not been proved.

The justices did not call upon the respondent, and they came to the following conclusions of law :—

(1.) That evidence of non-access was a condition precedent to the appellant's proceeding with her case ; (2.) that a deed of separation containing self-imposed obligations had not the same effect as a decree of judicial separation or a separation order in rebutting the presumptions of access and legitimacy, and that therefore the appellant was bound by the rule in *Russell* v. *Russell* (1), which prevented her from herself giving evidence of non-access the effect of which would be to bastardize her child, and that non-access by the husband must be proved by independent testimony, and, as stated, that non-access had not been so proved.

The wife appealed.

D. H. Robson for the appellant. A separation order has the effect of rebutting the presumption of access and legitimacy which arises from the continued existence of the marriage : *Hetherington* v. *Hetherington* (2) and *Andrews* v. *Andrews and Chalmers*. (3) The question in the present case is whether the execution of a voluntary deed of separation has the same effect. The authorities are conflicting. In *Mart* v. *Mart* (4) Bateson J., after full argument, held that it had that effect, and in *Rimmer* v. *Rimmer* (5) Hill J. gave a judgment which showed that if the point had been for his decision he would have decided it in the same way. But in *In re Bromage* (6), Luxmoore J. came to a different conclusion, and refused to follow *Mart* v. *Mart*. (4) But there was no argument on the point. If *Mart* v. *Mart* (4) was correctly decided, the appellant was free to give evidence of non-access though her evidence would tend to bastardize her child. If *In re Bromage* (6) was correct, *Russell* v. *Russell* (1) applies, and she could not give such evidence, but must prove non-access by independent evidence, which the justices have held that she failed to do.

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(1) [1924] A. C. 687.
(2) (1887) 12 P. D. 112.
(3) [1924] P. 255.
(4) [1926] P. 24.
(5) (1930) 46 Times L. R. 624, in a note to *Hadlow* v. *Hadlow*.
(6) [1935] Ch. 605.

It is submitted that the Court should follow *Mart* v. *Mart* (1) and *Rimmer* v. *Rimmer*. (2) In deciding *In re Bromage* (3) as he did Luxmoore J. was relying on two decisions of the House of Lords, *Morris* v. *Davies* (4) and *The Aylesford Peerage*. (5) But *Morris* v. *Davies* (4) was decided at a time, in 1837, when proceedings for judicial separation in their present form were unknown and when divorce alone rebutted the presumption of legitimacy. *The Aylesford Peerage* (5) merely followed *Morris* v. *Davies*. (4) Moreover, the present point was not material in either of those cases. Therefore *Mart* v. *Mart* (1) rather than *In re Bromage* (3) should be adopted by the Court in the present case.

Aarvold for the respondent. In cases of judicial separation there is statutory authority and the decision of a court to rebut the presumption of access and legitimacy. But a deed of separation is merely evidence of the intention of the parties to live apart, and that intention cannot be sufficient to negative the presumption of access; there must be something more. This deed gives no authority to the wife to prevent the husband from resuming cohabitation with her. Moreover, by its provisions, it applies only while she lives a chaste life. By issuing a complaint in bastardy the wife admitted unchastity and the husband's right to resume cohabitation revived. *In re Bromage* (3) was rightly decided and should be followed in preference to *Mart* v. *Mart*. (1)

Robson in reply. If the wife were unchaste the husband would have to come to the court to get the deed set aside before his rights to resume cohabitation revived.

LORD HEWART C.J. This special case raises a somewhat interesting point, and, if I may say so, the case has been presented with great ability and clearness. I desire to say how much the Court is indebted to counsel, who in a poor person's case has taken, and successfully taken, so much trouble to present the case as it should be presented.

(1) [1926] P. 24.
(2) 46 Times L. R. 624 (note).
(3) [1935] Ch. 605.
(4) (1837) 5 Cl. & F. 163.
(5) (1885) 11 App. Cas. 1.

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The matter arises in this way. A complaint was preferred by the appellant, a married woman, Ann Stafford, under the Bastardy Act, 1872, that she had given birth to a male bastard child on March 10, 1936, of which she alleged that the respondent, William Kidd, was the father. It was proved that the appellant was a married woman and was married on May 12, 1922, to Kellet Stafford, and that on November 14, 1934, they separated under a deed of separation.

The question raised is whether the execution of that deed, together with evidence that the deed was acted upon by the parties, had the effect which a decree of judicial separation might have had of getting rid of the presumption of legitimacy so as to admit of evidence of non-access being given by the appellant, although such evidence, if accepted, would have the effect of bastardizing the child. It was contended that the effect of the deed was not indeed of itself to establish non-access, but was to get rid of the presumption of legitimacy and enable the appellant to give evidence as to the paternity. In the result the justices came to the conclusion that the deed of separation had not that effect, and that the decision in *Russell* v. *Russell* (1), a decision binding on this Court, prevented the appellant from offering evidence of non-access. The question, therefore, is whether the justices were right in holding that the deed of separation did not have the effect which a decree of judicial separation would have had.

Our attention has been directed to such authority as exists. In 1925 there was a case before that very learned and distinguished judge, the late Bateson J., namely, *Mart* v. *Mart.* (2) In that case reliance was sought to be placed upon the provisions of a deed of separation to get rid of the presumption of access and legitimacy. It was argued on behalf of the respondent that the evidence was inadmissible, and *Russell* v. *Russell* (1) was referred to. Bateson J. dealt specifically with this point, and gave his decision in these unambiguous terms, as reported in the Times Law Reports (3): " It is argued by Mr. Hodson that the Court cannot look at the

(1) [1924] A. C. 687.

(2) [1926] P. 24; 42 Times L. R. 253.

(3) 42 Times L. R. 253; [1926] P. 26.

deed of separation because it offends against the rule in *Russell* v. *Russell.* (1) I do not think that it does so offend. It is an ordinary deed of separation with a covenant to live separate and apart, and in fact the parties did live apart under it. I think that the deed has the same effect as a judicial separation. It separates the two parties by their own agreement instead of by the order of the Court. It has been decided that where there has been a judicial separation it is presumed, in the absence of evidence to the contrary, that there has not been access between the spouses after the date of the decree, and that therefore, where a child is born more than nine months after the date of the decree, the presumption of legitimacy does not arise. I think that a deed of separation has the same effect." When Bateson J. referred to what had been decided as to the effect of a judicial separation, he was referring to *Hetherington* v. *Hetherington* (2) and *Andrews* v. *Andrews and Chalmers.* (3)

Mart v. *Mart* (4) was a clear decision after full argument that a deed of separation has the same effect as a decree of judicial separation. Five years later another very learned judge of the Probate, Divorce and Admiralty Division, Hill J., whose loss we have so much cause to deplore, delivered judgment in the case of *Rimmer* v. *Rimmer* (5) reported in a note to *Hadlow* v. *Hadlow.* (5) He said : " The presumption of law was that the child was the child of the husband and wife. There was nothing in a mere order for maintenance—and there was no proof of an agreement to live apart—to negative that presumption." It is perfectly clear that Hill J. was saying that if there had been an agreement to live apart other considerations would have applied.

So much for authority on that side of the question. But it is said that there is a still more recent case, namely *In re Bromage.* (6) In that case this topic was only incidentally mentioned, and there was no argument on it. It was submitted that *Mart* v. *Mart* (4) had not been correctly decided and that it was not in accordance with previous decisions, the epithet "previous" being by no means superfluous. The point having been taken in that way, but not seriously argued, and in a case where it was not necessary to the decision, Luxmoore J. felt it necessary to deal with it, and used these important words (1): "It is said that the execution of a separation deed where the parties are living apart under its provisions has the same effect as a decree for judicial separation or an order of a court of summary jurisdiction, and that in such a case the presumption [of legitimacy] has no application. In support of this contention reliance is placed on the decision of Bateson J. in *Mart* v. *Mart.* (2) With all respect to that learned Judge and notwithstanding my personal inclination to accept and follow that decision, it seems to me to be at variance with that of the House of Lords in *Morris* v. *Davies* (3), where the husband and wife were in fact living apart under a separation deed executed by them, and also with the decision in *The Aylesford Peerage* (4), where also the husband and wife had executed a separation deed and were at the material dates living apart under its provisions."

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(1) [1924] A. C. 687.
(2) 12 P. D. 112.
(3) [1924] P. 255.
(4) [1926] P. 24; 42 Times L. R. 253.
(5) 46 Times L. R. 624.
(6) [1935] Ch. 605.

The case of *Morris* v. *Davies* (3) is as old as 1837, and Mr. Robson has urged with great effect three points as to those two decisions of the House of Lords: (1.) that *The Aylesford Peerage* (4) added nothing new to *Morris* v. *Davies* (3); (2.) that in neither case was the question now raised the material one; and (3.) that in the reports of those cases it was difficult to find any passage dealing with this point. That argument is reinforced by consideration of the dates of those cases, since when there has been a considerable development in the law of matrimonial causes, especially the notable landmark of the Matrimonial Causes Act, 1857. *Morris* v. *Davies* (3) belongs to a period when divorce alone could get rid of the presumption of legitimacy, and when proceedings for judicial separation in their present form were unknown. In the present case the chronology makes an important difference, and the more recent decisions of

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(1) [1935] Ch. 605, 609.

(2) [1926] P. 24; 42 Times L. R. 253.

(3) 5 Cl. & F. 163.

(4) 11 App. Cas. 1.

Bateson J. and Hill J. are the guides which at this date the Court ought to follow.

Counsel for the respondent criticized the particular terms of the deed, which is to continue in force only so long as the wife continues to live chaste, and therefore, he contended, the husband might be entitled to treat it as terminated. With all respect to counsel, I think that that argument has no force, because a dum casta clause is common form in separation judgments and orders.

For those reasons I think the justices were wrong in deciding that a separation deed did not have the effect of a judicial separation.

That being so, important questions may—I am far from saying will—follow. It may be that the appellant, released from the fetters of *Russell* v. *Russell* (1), will be able to give evidence that her husband was in fact living apart, and so pave the way for other evidence. But I confine my judgment to deciding that the separation deed is sufficient to get rid of the presumption of legitimacy. The appeal will be allowed.

SWIFT J. I agree, and have nothing to add.

MACNAGHTEN J. I agree.

Appeal allowed.

Solicitors for appellant: *Isadore Goldman & Son, for Lionel Wolfe, Sunderland.*

Solicitors for respondent: *Maude & Tunnicliffe, for Morton & Morton, Sunderland.*

W. L. L. B.

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(1) [1924] A. C. 687.

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Oct. 22.

UNITED DAIRIES (LONDON), LIMITED *v.* STIRLING.

Workmen's Compensation—Incapacity—Injury causing loss of three fingers of one hand—Partial incapacity treated as total—Employers' application for review—Condition of injured hand static—Whether workwoman is " taking all reasonable steps to obtain employment " —Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 4*—Workmen's Compensation Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1.

Under s. 9, sub-s. 4, of the Workmen's Compensation Act, 1925, as amended by s. 1, sub-s. 1, of the Workmen's Compensation Act, 1931, the county court judge has power to order, in certain circumstances, that the workman's incapacity shall be treated as total incapacity for such period and subject to such conditions as may be provided by the order, without prejudice to the right of review conferred by the Act and subject to the proviso that no order shall be made under the sub-section if it appears to the judge that the workman has not taken all reasonable steps to obtain employment.

A woman who by reason of injury by accident arising out of her employment had suffered the amputation of three figures of her right hand was paid full compensation until 1934, when the employers were advised that she was then only partially incapacitated. She applied for an award, and the county court judge awarded compensation for partial incapacity treated as being total, under the above sub-section, finding that she had taken all reasonable steps to obtain work, but had failed.

In May, 1936, the employers applied to review and diminish the payment, alleging that, though the condition of the hand remained static, she was able to do certain work and had made little or no effort to obtain any work. The county court judge held that the employers had failed to show any change of circumstances, that he could not take into consideration the question whether the woman had or had not endeavoured to find work upon an application to review the payments, and dismissed it :—

Held, that as the workwoman had admitted that she had given up making any attempt to obtain suitable employment, this fact was a change of circumstances since the previous hearing which the county court judge was entitled to take into consideration on the application for a review for the purpose of deciding whether the conditions mentioned in s. 9, sub-s. 4, of the Workmen's Compensation Act still obtained, and that the case must be remitted to him to be reheard.

APPEAL from a decision of the judge of the Marylebone County Court, Middlesex, sitting as arbitrator under the Workmen's Compensation Act.

The respondent, Miss Mary Murray Stirling, met with an accident arising out of and in the course of her employment on December 12, 1932, the result of which was that she had to have the first three fingers of her right hand amputated. Compensation was paid until November, 1934, by agreement. On November 16, 1934, the Court, upon her application, awarded her 22*s.* 6*d.* a week for total incapacity. On May 15, 1936, the appellants made an application to review the weekly payment and either to terminate or diminish it, on the ground that they were advised that the respondent's condition had so far improved that she was capable of working. The respondent did not file any answer. The medical evidence was that her hand had been examined on July 5, 1935, and afterwards on June 17, 1936, and there was no material difference in it on these two examinations. The doctor on each occasion asked her what sort of work she could do, and whether she had had any success in applications for that kind of work. In June, 1936, she said that she had made a few applications but not very lately, as she had got tired of answering advertisements. She had not sought work through any Labour Exchange.

The county court judge made an award in favour of the respondent and dismissed the application with costs.

The applicants appealed on the grounds that the county court judge was wrong in law (1.) in dismissing the application for a review, (2.) in holding that the respondent must be treated as totally incapacitated, and (3.) in failing to have regard to the respondent's admission that she was taking no steps to obtain employment.

Gilbert Paull for the appellants. Where an award has been made for total incapacity under s. 9, sub-s. 4, of the Act of 1925, as amended by s. 1, sub-s. 1, of the Act of 1931, it is open to the employers to prove that there has been a change of circumstances, and obtain a review, otherwise an award under s. 9, sub-s. 4, might be equivalent to a pension for life.

[Slesser L.J. This point—whether an application for

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review can be based upon a subsequent change of conditions which originally would bring a workman within s. 9, sub-s. 4— does not appear to have been decided.]

A county court judge must not treat the proviso that no order shall be made under the sub-section if the workman has not taken all reasonable steps to obtain employment as a mere addendum. It is an integral part of the sub-section, and does not shift the onus of proof: see *Ingham* v. *Red Line Glico* (1); *Donachie* v. *Whitehaven Colliery Co., Ld.* (2); *Hughes* v. *Penmaenmawr & Welsh Granite Co., Ld.* (3) The workman is bound to take "all reasonable steps to obtain employment." Here the employers say that the girl is not taking all or any reasonable steps to obtain employment, and they have proved it, by her own admissions. Evidence that she had not gone to any Labour Exchange is evidence that she has not taken all reasonable steps.

A. W. Elkin for the respondent. I am in some difficulty, because I have not had any papers in the first arbitration.

[SLESSER L.J. The learned judge was in your favour on the first occasion. He found only partial incapacity, but treated the case, under s. 9, sub-s. 4, as one of total incapacity.]

The onus of proof was upon the employers to show that there was a change of circumstances, and they have not discharged it. The evidence showed that the condition of the respondent's hand was the same as it had been at the previous hearing when the county court judge decided to treat the partial incapacity as being total.

SLESSER L.J. This appeal succeeds. Mary Murray Stirling was injured on December 12, 1932, while working for the United Dairies (London), Ld., and had to suffer an amputation of the first three fingers of her right hand. As the result of that disability she received compensation and after a certain time, in 1934, the compensation ceased and an application was made to the Court for compensation under the Act. At that hearing it was alleged that this lady, though in one sense partially incapacitated physically, for only one of her hands was incapacitated, yet ought to be treated as totally incapacitated by reason of the language of s. 9, sub-s. 4, of the Workmen's Compensation Act, 1925, as amended by the Act of 1931.

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(1) (1932) 25 B. W. C. C. 567. (2) (1933) 150 L. T. 6; 26 B. W. C. C. 63.
(3) (1933) 26 B. W. C. C. 99; 148 L. T. 485.

To quote from the notes of counsel made at the time of the judgment of the learned deputy county court judge, Mr. Tudor Rees, he came to the conclusion that she was totally incapacitated, and he said: "I find she has taken all reasonable steps and failed. Stage further, due wholly or mainly to injury. I have no doubt at all that in fact injuries are wholly or mainly responsible for the continued disability." So far there is a finding, therefore, that this lady at the time when this order was made was, among other things, taking all reasonable steps to obtain employment. That finding was an essential part of the judge's finding if she was to be able to take advantage of the section, as was stated by this Court in the case of *Donachie* v. *Whitehaven Colliery Co., Ld.* (1) and affirmed in *Hughes* v. *Penmaenmawr & Welsh Granite Co., Ld.* (2)

It is sufficient for this purpose to point out that in the earlier case Lord Hanworth said: "The workman has to establish that he has taken all reasonable steps" and "the directory terms of the proviso seem to make the proviso in pari materia with the condition precedent."

Mr. Paull points out to us that there is a special provision in the section of the 1931 Act to the effect that the amendment of s. 9, sub-s. 4, of the 1925 Act shall be read without prejudice to the right of review conferred by that Act, and the right of review conferred by that Act entitles either party upon a change of circumstances to go to the Court and ask them to reconsider their award in view of the alleged change of circumstances.

The change of circumstances here alleged is that this lady, as is found by the county court judge, His Honour Judge Woodcock, "has not been making some efforts to find some

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(1) 150 L. T. 6; 26 B. W. C. C. 63.
(2) (1933) 148 L. T. 485; 26 B. W. C. C. 99.

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work." The learned county court judge came to the conclusion, as I understand his judgment, that once an order has been made under s. 1 of the 1931 Act, and where there is no medical change so that it can still be said that the workman has only so far recovered as to be fit for employment of a certain kind, the question whether the workman is after the judgment still taking or not taking all reasonable steps to obtain employment, is not a question which can be considered upon a review. He says : " I can't go behind that finding "— that is that the partial injury must be treated as total— " because she has not been making some efforts to find some work."

In my view that is erroneous. The workman is only entitled to the benefit of s. 9, sub-s. 4, of the 1925 Act, if and so long as she satisfies certain conditions. When those conditions change there is a change of circumstances. I might point out that any other reading of this proviso would have the effect that, once the workman's medical condition was established to be unchanged, the workman apparently might for an indefinite time fail to take reasonable steps to obtain employment, even though, as has been pointed out by Scott L.J., notwithstanding her medical condition she had been offered employment on terms equal to or slightly less than those of the employment in which she was engaged at the time of her injury.

It follows therefore that this case must go back to the learned county court judge for him to inquire whether on the facts of this case at the time when the review was sought it had or had not been established that the workman had taken all reasonable steps to obtain employment. That is essentially a matter for him. I do not think, for example, that where an order has been made under this section it would necessarily follow that an allegation by the employer that within perhaps a month of that time no steps had been taken to obtain employment, and the medical condition remains unchanged, would of itself justify the judge necessarily in coming to the conclusion that the proviso was not satisfied. That seems to me a matter of degree and of fact. The circumstances must all be taken into consideration, and whether it is or is not necessary to take steps to obtain employment, and whether it is reasonable, are primarily matter for the county court judge; but the employer is entitled to ask that there be a review, though the facts of each case will decide whether the particular review is or is not successful.

This case will, therefore, be remitted to the county court judge. The appeal will be allowed with costs, the costs of the first hearing to abide the decision in the second hearing.

SCOTT L.J. I agree.

EVE J. I also agree.

Appeal allowed.

Solicitors: *James Turner & Son; H. E. Aston.*

H. L. L.

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Nov. 24.

TRINIDAD PETROLEUM DEVELOPMENT COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income Tax—Claim to set off profits of one year against losses of former years—Payments of interest under deduction of tax—"Profits or gains brought into charge to tax"—Assessment of payer—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21; *Rules applicable to Cases I. and II. of Sch. D, r.* 6, *sub-rr.* 1, 3—*Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 33, *sub-s.* 1.

A taxpayer, who has deducted tax when paying a sum representing interest on money, is assessable to tax on that interest under r. 21 of the All Schedules Rules of the Income Tax Act, 1918, notwithstanding that he is entitled, under s. 33 of the Finance Act, 1926, to set off against his profits earned in the year of assessment losses, exceeding those profits, incurred by him in previous years.

So *held* by the Court of Appeal, affirming the decision of Lawrence J. [1936] 2 K. B. 185.

Attorney-General v. *Metropolitan Water Board* [1928] 1 K. B. 833 followed.

Appeal from a decision of Lawrence J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts (reported [1936] 2 K. B. 185).

At a meeting of the Commissioners on October 31, 1935, the Trinidad Petroleum Development Company, Ld., of River Plate House, Finsbury Circus, in the City of London (hereinafter called "the company"), appealed against an assessment made upon it under r. 21 of the All Schedules Rules of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, for the year 1933–34 in the sum of 46,032*l.* in respect of interest paid out of profits and gains not brought into charge.

For the year 1933–34 the company paid interest under deduction of tax to the British Controlled Oilfields, Ld., as follows:—

	£	*s.*	*d.*
July 31, 1933, on current account . .	11,065	4	6
December 1, 1933, on debentures . .	26,586	3	9
December 31, 1933, on current account.	8,380	12	9
	£46,032	1	0

The profits of the company as computed for the purposes of income tax for the year to July 31, 1932, to which date its accounts for the year previous to 1933–34 had been made up, were		£160,718
Less wear and tear brought forward from previous years	£48,715	
Less wear and tear for 1933–34	42,095	
		90,810
		£69,908

The company had claimed under the Finance Act, 1926, s. 33, sub-s. 1 (1), to carry forward losses of 26,473*l.* and 55,612*l.*, attributable to the years 1927–28 and 1928–29 respectively, and to set such losses off against profits on

(1) Income Tax Act, 1918, All Schedules Rules, r. 19 sub-r. 1: "Where any yearly interest of money . . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest . . . . but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest . . . . and the person liable to make such payment . . . . shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due. . . . ."

Rule 21: "(1.) Upon payment of any interest of money . . . . charged with tax under Schedule D . . . . . not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment. (2.) Any such person shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted . . . . and every such amount shall be a debt from him to the Crown and shall be recoverable as such. . . . ."

Finance Act, 1926, s. 33, sub-s. 1: "Where a person has in any trade, profession or vocation carried on by him . . . . sustained a loss . . . . in respect of which relief has not been wholly given under s. 34 of the Income Tax Act, 1918 . . . . or under Rule 13 of the Rules applicable to Cases I. and II. of Schedule D . . . . or under any other provision of the Income Tax Acts, he may claim that any portion of the loss for which relief has not been so given shall be carried forward and, as far as may be, deducted from or set-off against the amount of profits or gains on which he is assessed under Schedule D in respect of that trade, profession or vocation for the six following years of assessment; . . . ."

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which it might be assessable under Sch. D for subsequent years. The relief thus claimed fell under sub-s. 3 of the same section to be given to the extent of 69,908*l.* against the assessment for 1933–34; as follows:—

Assessable profits 1933–34		£69,908
Loss for 1927–28	£26,473	
Loss for 1928–29	55,612	
		82,085
Balance loss (attributable to 1928–29) carried forward		£12,177

On behalf of the company it was contended:—

(1.) That the amount of profits or gains on which the company was assessed under Sch. D for the year 1933–34 was 69,908*l.*;

(2.) That the fact that the company had a right under s. 33 of the Finance Act, 1926, to have losses of previous years deducted from or set off against the amount of the profits on which it was assessed for the years 1933–34 did not prevent such profits from being brought into charge to tax;

(3.) That 69,908*l.* was the amount of the company's profits or gains brought into charge to income tax for the year 1933–34;

(4.) That as the company's profits or gains brought into charge to tax exceeded the amount of the interest paid, such interest was wholly payable out of profits or gains brought into charge and was not assessable under r. 21.

On behalf of the Commissioners of Inland Revenue it was contended:—

(1.) That the interest in question came within r. 21 of the All Schedules Rules of the Income Tax Act, 1918.

(2.) That the profits and gains of 1933–34 against which losses had been set off by virtue of s. 33 of the Finance Act, 1926, were not profits and gains which had been brought into charge to tax for the purposes of r. 19 of those rules;

(3.) That the assessments should be confirmed.

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The Commissioners, who heard the appeal, confirmed the assessment appealed against.

Lawrence J., in confirming the assessment, said that, although the company had made a net profit for the year 1933–34 of 69,908*l.*, they paid no tax for that year, because they had brought forward losses which more than absorbed that profit. Their contention was that the payment of interest amounting to 46,032*l.* was wholly made out of profits or gains brought into charge, because it must be deemed to have been paid out of the 69,908*l.* which was the amount of their assessment before deduction of earlier losses. It was said that it was the practice, and that it was in accordance with the Income Tax Act, that the amount of profits and gains should be assessed in each year, that the effect of so doing was to bring those profits and gains into charge to tax, and that as soon as that was done r. 19 applied and r. 21 did not.

Counsel for the company had contrasted the procedure under s. 33 of the Act of 1926 with that under r. 6, sub-r. 3, of Cases I. and II. of Sch. D, dealing with wear and tear, and had said that the Legislature, in enacting s. 33, must consciously have used words designed to have a different effect from those of r. 6, sub-r. 3. That argument, however, conflicted with the authorities cited by the Solicitor-General, and even without the assistance of those authorities he (his Lordship) would have been of opinion that the words in r. 19 were not co-terminous with the word "assessed" in s. 33. The words "brought into charge to tax" appeared in their ordinary interpretation to refer to profits which had suffered taxation. It seemed impossible to treat the assessment which preceded the granting of relief as fixing the amount of profits brought into charge. The appeal must be dismissed.

The company appealed. The appeal was heard on November 24, 1936.

Needham K.C. and *J. S. Scrimgeour* for the appellants.

Sir Terence O'Connor S. G. and *R. P. Hills* for the Crown.

The arguments were the same as those appearing in the

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report of the Case in the Court below ([1936] 2 K. B. 185, at pp. 188–189) and are fully dealt with in the judgments of the Court of Appeal.

Slesser L.J. In this case a company, the Trinidad Petroleum Development Company, Ld., appeals against an assessment which has been made on it under r. 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, in respect of the sum of 46,032*l.* odd paid in respect of interest under deduction of tax to the British Controlled Oilfields, Ld. The question which has to be decided in this case is whether this payment comes under r. 21 or r. 19 of the General Rules to which I have referred. It is argued by Mr. Needham that the proper view is that r. 19 applies to this case, which, so far as material, is as follows: "(1.) Where any yearly interest of money . . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, ... but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such a payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due." It will be observed that r. 19, sub-r. 1, is dealing with a yearly interest of money payable wholly out of profits or gains brought into charge to tax, and the first question which has to be considered is the meaning of the words "brought into charge" in that connection. In my view, having regard to the decision of this Court in *Attorney-General* v. *Metropolitan Water Board* (1), and to the opinions expressed by all the learned judges in that case, to which I shall presently refer, it is not possible

(1) [1928] 1 K. B. 833.

for us sitting here to take any view but one as to the meaning of that language. Thus, Lord Hanworth M.R. (1), in considering the meaning of the words in r. 19 " payable wholly out of profits or gains brought into charge to tax " said: " They do not mean payment out of a fund that may be brought into charge, or is, or will be, a factor for the purpose of charge, but refer to a fund brought into charge out of which tax is payable and to be paid." And Sargant L.J. said (2): " In my opinion the words 'brought into charge' are more naturally and satisfactorily satisfied by the meaning placed on them by the Crown. The past participle 'brought' naturally refers to something that has been completed in the year in question, if not by actual payment at any rate by accrued liability to pay. It is only in a looser sense that it can be applied to a payment or liability to pay in respect of a succeeding year." Lawrence L.J. dealt more particularly perhaps with the matter we have here to consider, and he, following Lord Hanworth, said (3): " I have arrived at the conclusion that the expression 'profits or gains brought into charge to tax' in r. 19 means the taxable and not the actual profits or gains in the year of assessment." If that view, so expressed, is applied to the present case, and, as I have said, I think it must be applied, we have to have regard to its effect upon s. 33 of the Finance Act, 1926, which has brought the present problem before the Court. The fact is that though the profits of the company during the year 1932 amounted to 69,908*l.*, the assessable profits in 1933–34, there had been as regards the years 1927–28 and 1928–29 losses to the extent of 82,085*l.*; so that the balance loss carried forward was 12,177*l.* Now, under s. 33, sub-s. 1, of the Finance Act, 1926, it is provided that: " Where a person has in any trade . . . . sustained a loss . . . . he may claim that any portion of the loss for which relief has not been so given shall be carried forward and, as far as may be, deducted from or set-off against the amount of profits or gains on which he is assessed under Schedule D in respect of that trade." Therefore it

(1) [1928] 1 K. B. 843.

(2) Ibid. 847.

(3) Ibid. 852.

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follows from s. 33, that when the losses are taken into consideration as provided in s. 33, the difference is a balance loss of 12,177*l.* And in applying to the present case the test which has to be applied I think it is impossible to say that there was during the year of assessment any sum at all of profits to be brought into charge to tax. In fact the result is that the profits computed on the basis of s. 33 amount to nothing, and when regard is had to the language of this Court to the effect that the profits brought into charge to tax refer to the fund brought into tax out of which tax is payable and to be paid, the result is there is no such tax. Therefore, applying r. 19 in the way I have said, there is here no yearly interest of money payable wholly out of money brought into charge to tax, because, in my view, there were no profits.

That, in my opinion, is sufficient to determine this case in favour of the Crown. Mr. Needham argues, as I understand, that whatever has been said in the *Metropolitan Water Board* case (1), which was dealing with a liability for the year of assessment, cannot apply to s. 33, but has a more limited meaning, because, he says, s. 33 assumes an assessment which, in this case, would show an assessment on the profit of 69,908*l.*, and that it is only after that assessment has been ascertained and—as he says and, I think, must say—brought into charge to tax, that the later limb of that section requires that the person assessed may claim that the portion of the loss may be deducted therefrom. In my view, it is impossible to apply that requirement to the judgments in the *Metropolitan Water Board* case (1), because I think, as I have already said, that they are of general application. It is true that we have been referred to a case in the House of Lords, the *Central London Ry. Co.* v. *Inland Revenue Commissioners* (2), in which Lord Macmillan in his speech pointed out the very many difficulties and distinctions which might have to be met in dealing with this rule. But, in my view, it is not necessary here for me to consider how far that case may or may not have thrown light upon the decision of this Court. It is sufficient for me

(1) [1928] 1 K. B. 833.

(2) [1937] A. C. 77.

to say that I can find nothing in the speech of Lord Macmillan which in any way exonerates me from feeling bound by what has been said directly in interpreting r. 19 in this Court, and therefore I think that, important as that case may be, it would not be right to allow it to deflect one's judgment as derived from the positive decision referred to. For those reasons I think that this appeal fails.

ROMER L.J. I agree. This case is governed by the decision of the Court of Appeal in the *Metropolitan Water Board* case (1), a case which, in spite of the criticisms to which it has been subjected in the House of Lords in the case to which Slesser L.J. has just referred—*Central London Ry. Co.* v. *Inland Revenue Commissioners* (2)—has never been overruled and is binding upon this Court. As I understand that case the ground of the decision was this, that no one is entitled to retain income tax which he has deducted from interest paid by him unless he is in a position to say to the Crown: "I have already paid or become liable to pay this income tax to you, because I have paid or become liable to pay income tax on a sum which includes the interest which, having regard to the rules for ascertaining profits under the Income Tax Act, I was not allowed to deduct from my profits." I say that that appears to me to have been the ground of the decision in the *Metropolitan Water Board* case (1) for this reason, that Lord Hanworth, after citing *London County Council* v. *Attorney-General* (3), said this (4): "Both Lords Macnaghten and Davey intended that the right to retain"—that is to retain the tax deducted from interest—"was co-extensive only with the liability to tax of the fund out of which the interest is paid." Lawrence L.J. in the same case said (5): "It follows that under the provisions of rr. 19 and 21 no taxpayer can retain against the Crown any more income tax deducted by him in any year of assessment than he has himself paid or become liable to pay to the Crown for that year." It is true that Lord Macmillan in *Central*

(1) [1928] 1 K. B. 833.
(2) [1937] A. C. 77.
(3) [1901] A. C. 26.
(4) [1928] 1 K. B. 833, 845.
(5) [1928] 1 K. B. 852.

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London Ry. Co. v. *Inland Revenue Commissioners* (1) in commenting upon that authority said this: "The general principle of the *Metropolitan Water Board* case (2) may be stated thus: Whenever in any year the amount of interest paid by the taxpayer does not exceed the amount of his profits or gains as assessed for income tax purposes for that year, then the interest paid in that year is, within the statutory meaning, 'payable . . . out of profits or gains brought into charge to tax'." It will be seen Lord Macmillan there stated the principle of the *Metropolitan Water Board* case (2) in rather different language from that in which I have ventured to state it myself. It must, however, be remembered that Lord Macmillan was contemplating a case in which income tax would in fact be paid on the profits assessed for income tax and was not thinking of a case like the present where, the profits of the year having been assessed, no income tax becomes payable in respect of those profits, because the taxpayer is entitled to deduct something from that assessment. For those reasons I think this appeal fails.

GREENE L.J. I agree. Money received by a recipient of interest is treated by the Income Tax Acts as being what it in fact is—namely, his income. That is shown by the fact that, in the return of his total income which has to be made for certain purposes, the gross amount of the interest payable to him must be included as part of his income. That income the Act sets out to tax, as it sets out to tax all other incomes. The way in which it sets out to tax it is by allowing or compelling the payer to deduct the appropriate amount when he makes payment. That amount in the hands of the payer, being as it is an amount equal to the tax on that part of the recipient's income, is a sum for which the payer is prima facie accountable to the Crown; but he can discharge himself of the liability so to account provided he can show that the payment of interest which he has made is referable to a fund, real or notional, in respect of which he has been charged or is liable to be charged to income tax. The burden is upon

(1) [1937] A. C. 77, 84.
(2) [1928] 1 K. B. 833.

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him. In the present case, in my opinion, no such fund can be pointed to. Indeed Mr. Needham quite frankly admitted that the effect of his contention was that in the present case this piece of income which is unquestionably income of the recipient will escape payment of income tax altogether. If that is the clear result of the legislation, effect must of course be given to it; but having regard to the circumstance, which I think is clearly established, that these provisions for deduction are in their essence machinery enabling the Crown to obtain payment of the tax payable in respect of the recipient's income, I think that a construction which leads to that result is to be avoided, if the language fairly permits of it. Mr. Needham in the present case attaches very great importance to the circumstance that under s. 33 of the Finance Act, 1926, which is the section which gives rise to the present question, the particular machinery adopted for giving effect to the set-off of previous losses is not one whereby the assessment is reduced; the assessment is made and the assessment stands, but effect is given to the right to set off by what the section calls a deduction from or set-off against profits. Here again Mr. Needham quite frankly admits that, if the machinery adopted in the section had been one whereby the assessment was reduced, his argument could not have been sustained. In my opinion the distinction is much too fine a one. The substance of the matter is that whether the assessment is reduced or whether the assessment is left standing and the taxpayer is excused tax, the Crown has not been paid tax in respect of any ascertainable fund. That is the result of it, and in consequence it is impossible for the payer of the interest, in a case where s. 33 applies and to the extent to which it applies, to point to any fund real or notional out of which a real or notional payment of tax has ever taken place. The true fact is that as the result of the provisions of the section in the present case no tax falls to be paid at all, and the result of that, as I have already said, is that, if Mr. Needham's contention is correct, this piece of income which is income of the recipient will never pay tax to the Crown at all.

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The unreal nature of the distinction which he attempts to draw based on the language of s. 33 becomes, I think, rather more apparent when one considers that there are in the Income Tax Acts two other provisions dealing with the question of losses and the machinery by which the taxpayer is entitled to relief in respect of them. I do not propose to refer at length to those provisions. One of them is s. 34 of the Income Tax Act, 1918, and the other is contained in r. 13 of the Rules applicable to Cases I. and II. of Sch. D. When these provisions are examined it will be found that the language by which effect is to be given to the relief which the Legislature is minded to give to the taxpayer differs from that of s. 33, which we are now considering, and the machinery is different. The substance, nevertheless, is the same, and I for one am quite unable to draw that fine distinction based on the nature of the machinery provided when it is going to lead to a result which in my opinion is contrary to the whole sense and object of the legislation. I agree that the *Metropolitan Water Board* case (1) is really conclusive of the question here and conclusive for the reason that it is impossible to point to a fund real or notional in respect of which tax has been or will be paid. I agree that the appeal should be dismissed, with costs.

Appeal dismissed. Leave to appeal to House of Lords granted.

Solicitors for appellants: *Elvy Robb & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) [1928] 1 K. B. 833.

W. I. C.

HUGHES (INSPECTOR OF TAXES) *v.* BANK OF NEW ZEALAND.

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Dec. 3, 4, 7, 8, 9, 10.

Revenue—Income Tax—Exemption—Interest on War Loan, India Stock, and Colonial Securities—Income of London branch of Colonial Bank—Bank ordinarily resident in New Zealand—Trading expenses of bank—No apportionment of expenses, or disallowance in respect of exempted income—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 46—*Sch. C, General Rules, r.* 2 (*d*)—*Sch. D, Miscellaneous Rules, r.* 7, *sub-r.* 2—*Finance Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 21), *s.* 27.

The exemption from income tax of certain securities issued by the Treasury, such as War Loan, conferred by s. 46 of the Income Tax Act, 1918, in favour of persons not ordinarily resident in the United Kingdom is absolute and unqualified, and a similar absolute exemption applies to the interest or dividends on securities of a foreign State or British possession where the person entitled to them is not so resident, under r. 2 (*d*) of the General Rules under Sch. C.

Rule 7 of the Miscellaneous Rules applicable under Sch. D, applying all the provisions of Sch. C relating to the tax assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom, confers a similar exemption in favour of persons not resident in the United Kingdom on the interest received from securities of a Colonial public company or authority.

For the purposes of an assessment of trading profits under Sch. D, all such interest so exempted must be taken out of the accounts. There is no power to charge under Sch. D interest or income exempted from tax under Sch. C.

The Bank of New Zealand was registered and resident in New Zealand and carried on banking business at a branch office in London. It was assessed to income tax on the profits arising from its trade exercised in London under Case I. of Sch. D for the financial year 1927–28 in the sum of 94,448*l.* It possessed, as part of the assets of its London branch, holdings of 5 per cent. War Loan, India Government 3 per cent. Stock, and securities of the Grand Trunk Pacific Railway and the Auckland Electric Power Board, purchased out of the floating capital of the London branch, and other moneys obtained in New Zealand, to borrow which it had expended 41,262*l.* The interest on the War Loan and other stocks mentioned amounted to 78,556*l.* for the period in question :—

Held, that this sum of 78,556*l.* was altogether exempt from income tax, the War Loan under s. 46 of the Income Tax Act, 1918, the interest on the India Government Stock under r. 2 (*d*)

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of the General Rules applicable to Sch. C, and the interest on the other securities under r. 7 of the Miscellaneous Rules under Sch. D, and did not become taxable by being included in trading profits assessable under Case I. of Sch. D.

Held, further, that the bank was entitled for the purposes of assessment to deduct from its profits its proper trading expenses, including therein the sum of 41,262*l*., being the expenses particularly attributable to the earning of the said interest of 78,556*l*. and although the latter sum was in the circumstances immune from taxation.

Decision of Lawrence J. affirmed.

APPEAL from a decision of Lawrence J. on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The following statement of facts is substantially taken from the special Case :—

On January 12 and 19, 1934, the Bank of New Zealand appealed against an assessment to income tax in the sum of 94,448*l*. for the year ending April 5, 1929, made by the Additional Commissioners of Income Tax for the City of London under Case I. of Sch. D of the Income Tax Act, 1918, in respect of the profits arising from the trade carried on by the bank in the United Kingdom. The bank had its head office in New Zealand, and had always acted as banker to the Government of that Dominion. It was not disputed that the bank resided in New Zealand, and was not resident in the United Kingdom. It had a branch office in London and was admittedly assessable to income tax under Sch. D, Case I., on the profits arising from the trade exercised at the London branch office.

The assets held by the London branch of the bank in the year ending March 31, 1928, included holdings of 5 per cent. War Loan, India Government 3 per cent. Stock, and the securities of two Colonial companies, the Grand Trunk Pacific Railway and the Auckland Electric Power Board.

The amount of interest received on these securities during the year ending March 31, 1928, was 75,621*l*. on the War Loan, 1500*l*. on the India Government Stock, 412*l*. from the Grand Trunk Pacific Railway and 1023*l*. from the Auckland Power Board. All this interest was included in the trading receipts in the profit and loss account of the London branch. The interest on the War Loan was not assessed to tax under r. 1 (*f*) of Case III. of Sch. D, and was paid without deduction of tax. The interest on the other securities had been taxed by deduction, but the tax deducted had been repaid to the bank on the ground that it was not resident in the United Kingdom, but without prejudice to any question raised on the appeal.

A large part of the floating capital used by the bank in its trading at its London branch represented the reimbursement to it of money paid out by it in New Zealand to its New Zealand customers, under various kinds of operations. On the average of the weekly balances during the year ending March 31, 1928, the indebtedness of the London branch to the head office was 7,099,604*l.*, of which it was agreed that 3,520,290*l.* could properly be regarded as part of the circulating capital used by the bank in its London branch and derived from money borrowed by the bank in New Zealand, as distinguished from the bank's share capital and reserves. The money used by the bank at its London branch came into its hands not only from the direct remittance of money from New Zealand to London, but from international banking business, including the discounting of bills, the purchase and sale of bills and the collection and payment of them. The London branch collected larger amounts of money than it paid out to the head office, and the balances were used by the branch in the ordinary course of banking business, e.g., in making loans and purchasing bills and securities in London, and the profits so made were included in the accounts of the London branch.

It was admitted by the Crown that in computing its liability to income tax the bank was entitled to deduct, in addition to the general expenses of the London office, a due proportion of the interest paid by the bank on money borrowed in New Zealand and of the general expenses of the head office in New Zealand, as representing the cost of obtaining the money by the use of which its trading receipts in London were earned.

The amount to be so deducted was agreed between the parties subject to the following questions which were in dispute—namely: (*a*) whether, if the interest on the above mentioned securities was excluded from the trading receipts brought into the computation, any deduction should be allowed for the cost of obtaining the money by the use of which such interest was earned, and (*b*) whether in addition to the interest and expenses admitted by the Crown a further allowance should be made on the ground that part of the profits included in the accounts of the London branch should not be treated as profits of a trade exercised by the bank in London in view of the operations of the head office in New Zealand in obtaining the money used in London. The accounts of the London branch for the year ending March 31, 1928, showed a balance profit of 116,023*l.*, after charging on the debit side of the account the sum of 112,868*l.* for interest and expenses paid in New Zealand in respect of money borrowed in New Zealand and used at the London branch. This latter item included 41,262*l.* in respect of money borrowed in New Zealand and used in the purchase of the War Loan, India Government Stock, and other securities above mentioned.

The Crown was prepared to admit that this sum of 112,868*l.* was an allowable deduction for expenditure by the bank, if the interest amounting in all to 78,556*l.* on the above mentioned securities was included in the computation of the liability of the bank under Case I. of Sch. D, and the profit balance shown of 116,023*l.* was the amount to which it was contended by the Crown that the assessment should be amended. If the gross amount of such interest were excluded without any diminution of the expenses allowed to be deducted the assessable profit was 37,467*l.*

The Crown put forward an alternative contention that, if the said interest of 78,556*l.* were excluded, the interest of 41,262*l.* paid in respect of money invested in the securities in question ought to be excluded from the expenses deducted, in which case the assessable profit would be 78,729*l.* The bank also claimed that a further deduction should be allowed from its profits of the London branch, on the ground that part of those profits should be attributed to New Zealand.

It was contended on behalf of the bank (*a*) that the interest on the 5 per cent. War Loan owned by the bank was exempt from income tax under s. 46, sub-s. 1, of the Income Tax Act, 1918; (*b*) that the interest on the India Government Stock was so exempt under r. 2 (*d*) of the General Rules applicable to Sch. C, and that this exemption extended to interest on securities of Colonial companies by virtue of r. 7, sub-r. 2, of the Miscellaneous Rules applicable to Sch. D; (*c*) that the exemptions so conferred were absolute and unlimited, and the interest so exempted could not be taxed indirectly by inclusion in trading receipts taxed under Sch. D; (*d*) that in arriving at the balance of the profits of its trade in London for the purposes of assessment under Case I. of Sch. D the bank was entitled to deduct all the expenses incurred in earning those profits, without regard to the taxation or exemption of any particular item; (*e*) that the whole cost of obtaining the money used in earning the profits of the trade in London should be deducted in computing the liability under Case I. of Sch. D.; (*f*) that part of the profits received by the London branch was attributable to the operations of the bank in New Zealand and not in the United Kingdom and should be excluded from the computation for the purposes of the assessment.

The Crown, on the other hand, contended (*a*) that the interest received by the bank on the above mentioned securities formed part of the trading receipts of the trade exercised in the United Kingdom, and could properly be included in the computation for the purposes of assessment under Case I. of Sch. D; (*b*) that s. 46, sub-s. 1, of the Income Tax Act, 1918, and r. 2 (*d*) of the General Rules applicable to Sch. C merely exempted certain interest paid to persons not resident or not ordinarily resident in the United Kingdom from charge under Sch. C or Case III. of Sch. D, and did not exclude trading receipts of a trade from the computation of the profits of the trade for the purposes of assessment under Case I. of Sch. D; (*c*) that in any event r. 7 of the Miscellaneous Rules applicable to Sch. D was mere machinery for assessment and collection of tax and did not extend the exemption conferred by r. 2 (*d*) of the General Rules applicable to Sch. C to interest on the securities of Colonial companies ; (*d*) alternatively that if the profits of the trade were to be diminished by granting the above exemptions only the net profits derived from the securities specified should be exempted, and the cost of obtaining the money used in earning the interest omitted from the trading receipts should not be deducted as a trade expense ; (*e*) that all the profits included in the computation arose from the exercise of a trade in the United Kingdom by the use of money in London, and that no deduction was allowable, other than the actual cost to the bank of earning these profits ; and (*f*) that the assessment ought to be increased to 116,023*l.* or alternatively ought to be reduced to 78,729*l.*

The Commissioners held that all the interest on the above mentioned sums of War Loan and India Government Stock and the dividends on the stock of the Grand Trunk Pacific Railway and the Auckland Electric Power Board must be excluded from the computation of the bank's profits for assessment under Case I. of Sch. D. On the question of deduction of expenses they held that only the actual cost incurred by the bank whether in London or New Zealand in earning the trading receipts of the London branch could be set off against those receipts in arriving at the assessable profits arising to the bank from the trade exercised by it in the London branch, and that no further deduction could be allowed on the ground that a notional profit should be attributed to the bank's operations in New Zealand.

The Commissioners therefore reduced the assessment of the bank to 37,467*l.* Both parties declared their dissatisfaction with this decision as being erroneous in point of law, and required the Commissioners to state this Case for the opinion of the High Court.

After argument on the Case stated, Lawrence J. upheld the decision of the Commissioners, and the Crown appealed.

Sir Donald B. Somervell A.-G. and *Reginald P. Hills* for the appellant.

A. M. Latter K.C. and *J. S. Scrimgeour* for the respondent.

The arguments appear fully in the above contentions and in the judgment of the Master of the Rolls.

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The following cases, in addition to those referred to in the judgments, were cited in argument: *Timpson's Executors* v. *Yerbury (Inspector of Taxes)* (1); *Singer* v. *Williams* (2); *Last* v. *London Assurance Corporation* (3); *Gresham Life Assurance Society* v. *Styles* (4); *Neumann* v. *Inland Revenue Commissioners* (5); *Inland Revenue Commissioners* v. *Dalgety & Co., Ld.* (6); *Northern Assurance Co.* v. *Russell* (7); *Commissioner of Taxes* v. *The Melbourne Trust, Ld.* (8); *Fry* v. *Burma Corporation* (9); *Simpson* v. *The Grange Trust, Ld.* (10)

Lord Wright M.R. In this appeal the Court are all agreed what their decision ought to be. It is a case of importance and of complexity, but, as we are all agreed, I think it desirable to give judgment at once, especially at this stage of the term, and I shall proceed to do so.

The taxpayer here, the Bank of New Zealand—the respondent on this appeal—is a bank registered and resident in New Zealand. It carries on, and at all material times did carry on, its banking business in London, but not so as to be resident or ordinarily resident in the United Kingdom. It carries on its banking business at a branch office in London, and there is no question but that, in respect of profits arising from the trade exercised at the London branch office, it is assessable to income tax under Case I. of Sch. D.

The two main questions which have to be decided are, first: What limitations are to be imposed upon those profits? That involves an investigation of certain exemptions which, it is claimed, have to be applied in considering what are the assessable profits under Case I. Then there is a second main question, which arises in the event of the first question being decided against the Revenue, and that is: What deductions are permissible under the Rules in order to ascertain the balance of profits and gains under Case I.?

(1) [1936] 1 K. B. 645.
(2) [1921] 1 A. C. 41.
(3) (1885) 10 App. Cas. 438.
(4) [1892] A. C. 309.
(5) [1934] A. C. 215.
(6) [1930] A. C. 527.
(7) (1889) 2 Tax Cas. 551.
(8) [1914] A. C. 1001.
(9) [1930] A. C. 321.
(10) [1935] A. C. 422.

There are comparatively few facts which I need detail. There is a summary or skeleton statement of the financial position of the bank, so far as is material for the purposes of this case—that is to say, a statement of the material receipts and expenses of the London branch. That summary of accounts refers to four sets of receipts on the credit side. The first is interest on 5 per cent. War Loan, amounting to 75,621*l.*; the second is interest on India 3 per cent. Stock, which amounts to 1500*l.*; then there are two other items which go together—one is interest on Grand Trunk Pacific Railway Bonds, which is 412*l.*, and the other is interest on Auckland Electric Power Board Bonds, 1023*l.* These four figures are the items about which the dispute centres. On the other side there are set out working expenses and various other expenses, and a particular matter to which I must refer here is an item "Interest and expenses paid in New Zealand in respect of money borrowed in New Zealand, and used at the London branch"; that total figure is 112,868*l.*; but we are only concerned here with a proportionate amount of that figure, namely 41,262*l.*, which is said at this stage in the case to be in respect of money borrowed in New Zealand and used in the purchase of the above mentioned assets of the London branch, namely, the securities mentioned in the four items of receipts to which I have already referred. The main charge here is for interest. The money used for the purchase of these various securities in London was part of the floating capital used by the bank in its trading at its London branch, and it is not necessary to consider why. It is a matter of ordinary business. As a matter of accounting between the two sections, between the London branch and the main office, the London branch was debited with these interest charges. They retained these moneys out of amounts collected, and used these balances due to the head office, so far as they retained them, in the ordinary course of their banking business, either for making loans or for purchasing bills or securities in London, the profits derived from that use of the money being included in the accounts of the London branch. One other thing I may mention: The four securities that I have already referred to are different in certain incidents in their character. The War Loan was dealt with by being paid without deduction of tax, and was not assessed to tax at all so far. The interest on the India Government Stock and on the securities of the two Colonial companies had been taxed by deduction in the ordinary course, that is to say, by the agents who were entrusted by the India Government or the various companies with the payment in this country of the interest on the securities. The tax deducted has been repaid to the bank on the ground that it was not resident in the United Kingdom, but without prejudice to any of the questions raised on the appeal.

The general position is this, that if the Crown succeed on their claim that these four sets of securities are all of them liable to taxation under Case I. of Sch. D, the interest will amount to 78,556*l.*, and that is the first main question divided into three branches, because different considerations apply to the three classes of securities. Then, if that is decided against the Crown, a further point arises whether the 41,262*l.*, which is treated as paid in respect of the money invested in the securities, ought to be excluded in ascertaining the balance of profits and gains under Case I. of Sch. D, or whether any part of that should be so excluded.

The Special Commissioners and Lawrence J. have both decided against the Crown and in favour of the taxpayer, the bank. I may say at once that a great many cases have been cited to this Court and a great many arguments have been adduced. If I do not refer in detail to all those cases or to all those arguments, it must not be thought that I have failed to do so out of any disrespect or from any disregard of the cases and the arguments, which I have considered to the best of my ability. But it seems to me many of these authorities and many of these contentions do not really assist in coming to a conclusion on the matters before the Court, and I have, therefore, felt it best to decide the case, as far as I can, on the construction of the relevant sections and on the broad principles which appear to me to be necessary to be applied in construing these sections.

I shall deal first with the matter of the War Loan, because that depends on a quite different set of sections. The position is this: It is not denied by the Crown that the War Loan interest, as interest, is immune from taxation, and, therefore, cannot be taxed as interest either under Sch. C or under Case III. of Sch. D. The exemption under the sections to which I shall refer in a moment is admitted, but it is said that the Crown are entitled to disregard the possibility of taxing under the other Schedules or Cases, or to disregard the immunity under the other Schedules or Cases, and to fix their attention on Case I. of Sch. D, and they claim that they are entitled, on any view, to tax under that Case. The question which arises more particularly in the two following classes of interest, but which also arises here (or perhaps arises equally in all three) is that the bank is not a resident but is a trader, and, therefore, an exception which only applies to it as a non-resident, it is said, has no bearing at all upon the claim to immunity in respect of its position as a trader, because, as is well known, the essence of liability in questions of this sort is that the taxpayer is carrying on a trade in this country, and it does not matter whether he is resident or not; the essential feature is that he is trading in the country. That is under r. 1 (*a*) (iii.).

It is necessary to consider what is the exemption relied on by the respondent here, and that is to be found as the law now stands in s. 46 of the Income Tax Act of 1918. I ought perhaps to read that section, as it is so important in this case. It seems to me to be perfectly clear. It is in these terms: " Where the Treasury have before the commencement of this Act issued or may thereafter issue any securities which they have power to issue for the purpose of raising any money or any loan "—then follow the material words—" with a condition that the interest thereon shall not be liable to tax or super-tax, so long as it is shown, in manner directed by the Treasury, that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom, the interest of securities issued with such a condition shall be exempt accordingly." Then there is a provision as to the securities forming part of the investments of a foreign insurance company. That provision I do not think throws any real light on the question here. There is, however, another section to which I ought to refer, and that is s. 49, sub-s. 2: "The Treasury may direct that any Exchequer bonds, issued under their authority during the continuance of the present war and a period of six months thereafter, and any securities issued under the War Loan Acts, 1914 to 1917, or any Act amending those Acts shall be issued, or shall be deemed to have been issued, subject to the condition that the interest on the bonds and securities shall be paid without deduction of tax, and the interest shall be so paid accordingly, but any such interest shall be chargeable under Case III. of Sch. D." I think it is useful, without going into the history of this particular line of legislation too minutely, to refer to one section in the Finance Act of 1915, namely s. 47, which was reproduced in s. 46 of the Act of 1918, which I have just read; but be it noted that s. 47 of the Finance (No. 2) Act, 1915, has not been repealed, and, therefore, must be read along with s. 46 of the Act of 1918: "The Treasury may, if they think fit, during the continuance of the present war and a period of twelve months thereafter, issue any securities which they have power to issue for the purpose of raising any money or any loan with a condition that neither the capital nor the interest thereof shall be liable to any taxation, present or future, so long as it is shown in manner directed by the Treasury that the securities are in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom, and securities issued with such a condition shall be exempt accordingly." That was slightly modified in s. 44 of the Finance Act, 1916, but for immediate purposes it is necessary, I think, only to refer to s. 46 of the Act of 1918 in this connection. Sect. 46 is in my opinion a perfectly general exception; the language is unqualified. It says that the securities are not to be liable to tax or super-tax if the Treasury have issued them subject to the condition which is stated. We have been supplied with a copy of the prospectus issued by the Treasury dated 1917 as an illustration of what course is to be taken in these cases, and this is what it says: "Stock and Bonds of these Loans and the Dividends payable from time to time in respect thereof, will be exempt from all British taxation, present or future, if it is shown in the manner directed by the Treasury that they are in the beneficial ownership of a person who is neither domiciled nor ordinarily resident in the United Kingdom of Great Britain and Ireland. Further, the dividends payable from time to time in respect of Stock and Bonds of these Loans will be exempt from British income tax, present or future, if it is shown in the manner directed by the Treasury that the Stock or Bonds are in the beneficial ownership of a person who is not ordinarily resident in the United Kingdom of Great Britain and Ireland, without regard to the question of domicile." I do not read that as throwing any light on the construction of s. 46, but it does seem to me to state correctly what s. 46 means, and to give effect to its terms. If, notwithstanding what I regard as the clear language of this section, it was construed as merely relating to interest as interest, which is the expression used in argument by Mr. Hills as defining its meaning, with the consequence that the owner of the securities —in this case the bank—can only escape taxation if the tax is sought to be imposed upon him under Case III. of Sch. D and that he is liable to be taxed under the provisions of Case I. of Sch. D, then it seems to me that a result is being reached which is quite contrary to the apparent meaning of the particular legislation and which, to my mind, involves the very serious frustration of what I imagine the parties taking the securities from time to time, might be assumed to have contemplated. The section was put in in 1915, when it was undoubtedly desired to attract subscriptions to loans which were being put forward, as we well remember in those critical years of the War. It seems to me that it would be rather deplorable if, notwithstanding what I regard as the clear language of s. 46, the owner, not being ordinarily resident in the United Kingdom, was still taxed as part of his trading profits, and in my view that is not the true construction of the section. It is not introduced in respect of any particular

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Schedule; it is quite general, and that it is quite general is made even more apparent when reference is made to s. 47 of the Finance (No. 2) Act, 1915. I see no ground at all consistent with ordinary principles of construction for cutting down its meaning and treating it as only applicable to Case III. of Sch. D, the Case under which by s. 49 War Loan Securities were taxable if they were taxable at all. If they are not taxable at all, then obviously they can neither be charged under Case III. of Sch. D nor under any Case of Sch. D at all.

As I say, the matter is purely one of construction, and I do not think there is any authority which throws any direct light on a matter of this sort. A reference has been made to the case of *Sinclair* v. *Cadbury Brothers, Ld.* (1), where effect was given to an Act of Parliament—an old Act of 1660—which provided in respect of a particular piece of land that that should be immune from every charge under any public tax. The question arose in a somewhat curious way. Cadbury Brothers were occupying the land in question as lessees for the purposes of their business. In their capacity as occupiers of the land it was claimed that they were entitled to deduct in estimating their profits and gains the annual value of the land which they so occupied for the purposes of their trade, and it was held that if they were not allowed to do that they would be, as occupiers, indirectly taxed to pay a sum of money or otherwise charged in respect of the lands contrary to the Act of Charles II., and it was held that they were entitled so to deduct it. It was argued that as this land was not separately assessed and charged under Sch. A because exempted from taxation under the Act of Charles II., therefore the annual value could not be deducted under the well known provisions of Sch. D, Case I., but that contention was rejected as involving a contravention of the Act giving the immunity and, in my opinion, equally, there would be a contravention of s. 46, construed, as I construe it, in wide terms and as a general exemption if, notwithstanding s. 46, the bank were taxable in respect of their War Loan under Sch. D, Case I., as part of the trading receipts.

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(1) (1934) 18 Tax Cas. 157; 148 L. T. 478.

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In my opinion the effect is that these receipts and interest are taken entirely out of the taxable income of the bank in this country. Mr. Hill's ingenious argument started with the proposition that s. 46 only related to interest as such and, further, praying in aid s. 42, sub-s. 2, he contended that the interest in question was transferred to Case III. of Sch. D, that the effect of s. 46 was merely to debar the Crown from enforcing that charge and that the Crown were therefore free to charge under Case I. of Sch. D as part of the trading profits, notwithstanding s. 46, which he said was irrelevant in this connection, and he relied very strongly on the well known proposition that the Crown, in certain cases, may elect under which Case of Sch. D—because that is all he is concerned to argue in this Court—they will charge the taxpayer. He relied on *London, Liverpool and Globe Insurance Co.* v. *Bennett.* (1) In that case, which is very familiar, an insurance company which carried on businesses here and abroad had very large investments in foreign States, as they were required to have under the relevant laws of the States as the condition of carrying on an insurance business there. They did not bring the interest on those investments home to this country. They received it abroad and they did not remit it here. Under the law as it then stood, under the Fourth Case of Sch. D of the Act of 1842, the duty to be charged was only to be computed on the full amount of the sums which had been or would be received in Great Britain in the current year without any deduction or abatement. What the Crown did was to ignore the question of charging under Case IV., because if they had gone to that particular cupboard they would have found that the cupboard was bare ; but they decided to charge under Case I., and all the three Courts who tried the case decided that they were entitled to do so. It is sometimes put on the footing that where you have, as you have in Sch. D, a number of Cases, and those Cases overlap, as they do in certain events, and in certain matters, and it is more beneficial to the Crown to proceed under one Case rather than under the other, the Crown can choose which Case they will proceed under. For instance, if they proceed under Case I. they will be able to tax traders who are non-resident but they will be bound to allow against the amount of the interest in a case such as that in question the expenses of the business. The interest is part of the receipts and has to be brought into account and, on the other side, the expenses of the business will have to be brought into account. On the other hand, if they charge tax under Case IV., that will not be subject to abatement by reason of expenses; they will recover on the basis of the actual interest recovered. In that particular case there was the wider and more convincing reason that there was no taxable subject under Case IV., but that, in my opinion, throws no light upon a case like the present. There was no exemption or exclusion in question in that case. It was simply a question of the content of the subject-matter of charge under Case IV. In the case now in question according to my construction of s. 46 there is a definite exclusion from all taxation and there can be no question at all of taxing either under Case III. of Sch. D or under Case I. Whichever cupboard the Crown goes to under the circumstances of this case they will find it entirely bare for purposes of taxation so far as this War Loan is concerned. I agree, therefore, with the decision of the Commissioners and the Court below.

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(1) [1913] A. C. 610.

The next part of the case involves rather different considerations, but again it raises the same question—namely, whether the bank is exempted from taxation by the provisions of the Act in such a way that it cannot be taxed under any specific Schedule—in this case Sch. C—because it is a non-resident and, as in the previous case, whether the Crown, notwithstanding such exemption as there is, are still entitled to charge under Case I. of Sch. D on the footing that the interest in question constitutes profits of a non-resident trader. The position here depends on the General Rules of Sch. C. The interest of the India Stock in question constitutes profits payable out of the public revenue. There are certain rules applicable to Sch. C which define the content and nature of the charge.

The first body of Rules is called General Rules. I need

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not refer to No. 1, but No. 2 is a rule relied on as embodying the exemption. It says: "No tax shall be chargeable in respect of" certain items, and the first is : (*a*) "The stock, dividends or interest transferred to accounts in the books of the Bank of England in the name of the Treasury or the National Debt Commissioners in pursuance of any Act of Parliament, but the Bank of England shall transmit to the special commissioners an account of the total amount thereof"; and then (*b*) : "The stock, dividends or interest belonging to the Crown in whatever name they may stand in the books of the Bank of England"; and then (*c*) : "The stock, dividends or interest of any accredited minister of any foreign State resident in the United Kingdom." The content of (*a*) has not been very precisely defined by either side, but it is perfectly clear that (*b*) and (*c*) are dealing with an absolute exemption. Then comes (*d*), which is material for the purposes of this case : "No tax shall be chargeable in respect of—The interest or dividends on any securities of a foreign State or a British possession which are payable in the United Kingdom, where it is proved to the satisfaction of the Commissioners of Inland Revenue that the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom." Then there are other provisions which I may ignore, but I think r. 3 ought also to be looked at. It is in these terms : "Any bank carrying on a bona fide banking business in the United Kingdom shall be relieved, by repayment or otherwise, from tax under this Schedule in respect of the interest on any securities which the bank proves to the satisfaction of the special commissioners to represent subscriptions by the bank to any Government loan issued for the purposes of the present war either before or after the passing of this Act, and the bank shall include the amount of any such interest in the computation of its profits or gains for the purpose of assessment under Case I. of Schedule D." That r. 3 affords a striking contrast to the rule which I have just read in, r. 2. In the first place it is limited to tax under this Schedule and, in the second place, it provides in terms that the amount of such

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interest is to be included in any assessment under Case I. of Sch. D.

It is contended on behalf of the bank accordingly that r. 2 (*d*) is not limited to charges under Sch. C but is general in the exemption which it gives, and that therefore the same result follows in connection with the India Stock —namely, that the owner can claim an exemption if he is able to show to the satisfaction of the Commissioners of Inland Revenue that he is not resident in the United Kingdom.

There are other Rules which I may refer to, under the heading: "Rules as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland and the National Debt Commissioners are entrusted." That will deal with cases under r. 2 (*d*). There are elaborate provisions dealing with, among other things, the way in which the tax in a case of this sort has to be dealt with. In the first place, the person responsible for collecting the tax is the person entrusted with the payment of the dividends, and he is under an obligation to make returns to the Inspectors appointed by the Commissioners of Inland Revenue, and the Special Commissioners are to have all necessary powers to examine and check the books and accounts of dividends: "and shall assess and charge the dividends at the rate of tax in force at the time of payment, but reduced by the amount of the exemptions (if any) allowed by them"—that is by the Special Commissioners: "and shall give notice of the amount so assessed and charged to the person intrusted with payment" —that is to say the agent or nominee of the foreign or Colonial Government who is the person responsible to pay the dividends on behalf of the person entitled thereto and pay the tax to the general account of the Commissioners. That in itself is in one sense machinery, but it has this effect, that the tax is not directly chargeable upon the owner of the security but it is chargeable upon the person entrusted by the foreign or Colonial Government with the duty of paying in England the interest, and though it may be that any one who is exempt from a liability to pay may have that exemption made effective in the returns provided by the person entrusted with

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the payment, it is not excluded and it seems to be recognized as proper practice that, if that procedure has in fact taken place, the owner may, in appropriate cases, claim a repayment of the tax deducted. That was done in the present case, as it is stated in the Case: "The interest on the India Government Stock and on the securities of the two Colonial companies had been taxed by deduction in the ordinary course, but the tax deducted therefrom had been repaid to the bank on the ground that it was not resident in the United Kingdom but without prejudice to any of the questions raised on the appeal."

That being the general position, it is contended on behalf of the Crown that though this provision is effective as regards charges under Sch. C, it has no effect at all as regards an alternative claim under Sch. D, Case I., and, while Mr. Hills has conceded in this Court, on the basis of *Fry* v. *Salisbury House Estate, Ld.* (1), that he cannot contend that the Crown has a right of election between Sch. C and Sch. D, yet he says it is not necessary so to contend in this case, because under the terms of Case III., r. 1 (*c*), these are "profits on securities bearing interest payable out of the public revenue other than such as are charged under Schedule C." Admitting, as he does, that they are not chargeable under Sch. C, he uses that sub-rule as bringing the matter within the purview of Sch. D, and then he says that the Crown have the right of election to tax under Case I. or Case III. of Sch. D.

I do not, however, follow that his argument is that the exemption would not also apply under Case III., and, if that is so, the curious result would follow that the exemption takes the profits out of Sch. C. and transposes them to Case III. of Sch. D, without destroying the exemption which would still apply, although, according to the argument, it is limited to Sch. C, with the only practical result that it gives the Crown in that event an option to a charge under Sch. D, Case I. But for various reasons I cannot accept that argument, which appears to me to be very artificial and not well founded.

The real and final argument against the view which Mr. Hills

(1) [1930] A. C. 432.

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put forward is, however, to my mind this, that the exemption under Sch. C, r. 2 (*d*), is an unlimited exemption, as unlimited as the exemption which I have already discussed in the case of War Loan. I think that appears from the mere language of Sch. C, r. 2 (*d*), but, if there were any doubt about it, I think that doubt would be resolved by the consideration that this Act is a Consolidation Act and that Sch. C, r. 2 (*d*), is, as I think, merely repeating the exception which was given for the first time to securities of this class in s. 71 of the Finance Act of 1910. That exception, which is unlimited in language, cannot be taken as appertaining to any particular Schedule, except on the ground, of course, that there could be no charge on these particular securities except under Sch. C; but the section itself, sub-s. 2, runs in these terms: " Income tax shall not be payable in respect of the interest or dividends of any securities of a foreign State or a British possession which are payable in the United Kingdom, where it is proved to the satisfaction of the Commissioners that the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom." That seems to me to cover any question of income tax in respect of the interest or dividends in question. I think that the effect of that is reproduced in the words " No tax shall be chargeable in respect of the interest or dividends on any securities of a foreign State or a British possession," and as I regard the exemption in s. 71, sub-s. 2, as unlimited, so I construe the exemption in Sch. C, r. 2 (*d*), of the Act of 1918 as equally unlimited. The effect of the exemption is not changed by the mere fact that for purposes of drafting there is a different arrangement, and because r. 2 (*d*) is placed in the position where it is, and that, I think, sufficiently disposes of the objection and makes it unnecessary to consider any further the somewhat artificial suggestion that the only effect of Sch. C, r. 2 (*d*), is to remove the tax from Sch. C and put it into Sch. D. Mr. Hills, as I understand, has accepted the position, so far as this Court is concerned, that there can be no interchange as between one Schedule and other. He treats that point as decided by this Court in the case of *Thompson* v.

Trust and Loan Co. of Canada (1), and he accepts, so far as this Court is concerned, the views expressed by Lord Atkin in *Fry* v. *Salisbury House Estate, Ld.* (2)

I should like to read a short passage from that judgment, because it is peculiarly applicable to the whole of the argument of Mr. Hills in this case. Lord Atkin says (2): "The scheme of the Income Tax Acts is and always has been to provide for the taxation of specific properties under Schedules appropriated to them, and under a general Sch. D to provide for the taxation of income not dealt with specifically." I observe the words "not dealt with specifically," because these taxes are dealt with specifically in the Act of 1918 under Sch. C and, therefore, Sch. D on that basis cannot apply at all. The noble and learned Lord proceeds: "Sch. A provides for the taxation of income derived from property in land; B for income derived from the occupation of land; C for income derived from Government securities; E for income derived from employment in the public service. It is unnecessary to go further back than the Income Tax Act of 1842, the provisions of which were incorporated in every Customs and Inland Revenue or Finance Act up to 1918, when the present Consolidation Act was passed. I need not repeat the familiar Schedules altered and extended by the Act of 1853. It is only necessary to refer to s. 100 of the Act of 1842, which defined the tax to be imposed under Sch. D," and further on Lord Atkin quotes from Sch. D: "'The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules (A), (B) or (C), and to every description of employment of profit not contained in Schedule E.' My Lords, nothing could be clearer to indicate that the Schedules are mutually exclusive; that the specific income must be assessed under the specific Schedule; and that D is a residual Schedule so drawn that its various Cases may carry out the object so far as possible of sweeping in profits not otherwise taxed. For this reason no doubt the

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(1) [1932] 1 K. B. 283, 517; 16 Tax Cas. 394.
(2) [1930] A. C. 432, 454.

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actual Schedule was drawn in the widest terms." Then Lord Atkin proceeds, after quoting the words of Sch. D: "Such language covers income from land in Sch. A and from Government securities in Schedule C. Its true meaning is made apparent by s. 100. Moreover, the dominance of each Schedule A, B, C and E over its own subject-matter is confirmed by reference to the sections and rules which respectively regulate them in the Act of 1842. They afford a complete code for each class of income dealing with allowances and exemptions, with the mode of assessment and with the officials whose duty it is to make the assessments. Thus under A and B the assessment and collection is regulated by the general Commissioners; under C the assessment is by Commissioners specially appointed for the purpose; under E the assessment and collection are made in the departments or by the officers of the public corporations concerned; while under D the assessment is regulated by additional Commissioners. I find it impossible to conceive that these various Commissioners had an option to encroach upon the duties of one another, or that the taxpayer was exposed to having his income freed from the restrictions and exemptions imposed by statute under one Schedule in order to be subject to a different set of restrictions and exemptions imposed by statute under another Schedule." Later on, Lord Atkin says (1): "I am of opinion that income derived by a trading company from investments of its funds, whether temporary or permanent, in Government securities must be taxed under Schedule C, and cannot for the purposes of assessment under Schedule D be brought into account."

I will not read any more of that passage, which, I venture to think, is of great importance in considering the various arguments advanced in this case. It is, I think, quite wrong to say that Sch. C, r. 2 (*d*), is merely dealing with the machinery of collection; not only does it contain an exemption, but, by its terms, it gives a right of repayment if necessary to a person who is not resident in the United Kingdom, and the various Rules as to interest, and so forth, which are set out in the

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(1) [1930] A. C. 456.

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second and third sets of Rules under Sch. C are Rules which, as Lord Atkin points out, deal with substantive matters—namely, the imposition of the charge and the responsibility for paying the charge upon the person entrusted and various ancillary rights and responsibilities which flow from that position.

On this point as a whole my conclusion is that the words of Sch. C, r. 2 (*d*), are sufficient to embody a complete and general exemption in respect of all taxation under the Act of 1918. I am, of course, in this judgment not dealing with super-tax at all, but with matters arising on what used to be called " ordinary income tax."

I pass now to the third head—namely, the question of the securities of the two Colonial companies. That raises a different question, because in order to deal with that case it is necessary to arrive at a conclusion as to the meaning of r. 7, sub-r. 1, of the Miscellaneous Rules applicable to Sch. D. If the construction of that rule is held to be of a particular nature, its effect will simply be to throw the income of these particular securities into the same class and into subjection to the same Rules as I have held should be applied in regard to foreign and Dominion securities. Whether or not that is so is a matter not without difficulty, but I have come to the conclusion in agreement with the Commissioners and the learned judge that r. 7, sub-r. 1, has that effect and that, therefore, the same conclusion applies to these securities as that which applies to those which I have last been discussing.

There are, however, various matters to be considered in order to justify that conclusion. Rule 7, sub-r. 1, appears, as I have indicated, in the body of Miscellaneous Rules, but I do not think that the position in which, for reasons of draftsmanship or for convenience, a provision appears in an Income Tax Act can in any way be treated as decisive of the scope and effect of the provision. I should like to refer to a passage from Lord Sumner's judgment in *Kirke's Trustees* v. *The Commissioners of Inland Revenue.* (1) Lord Sumner was there dealing with the question as to the right of repayment

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(1) 1927 S. C. (H. L.) 56; 11 Tax Cas. 323, 332.

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of Excess Profits Duty, and the language which had to be construed was this: "Where any person has paid Excess Profits Duty, the amount so paid shall be allowed as a deduction in computing the profits or gains of the year which included the end of the accounting period in respect of which the Excess Profits Duty has been paid; but where any person has received repayment of any amount previously paid by him by way of excess profits duty, the amount repaid shall be treated as profit for the year in which the repayment is received." That was found in r. 4, sub-r. 1, of the Rules applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918. Lord Sumner dealing with it says this: "The express mandatory terms of the sentence show, in carefully chosen language, that he" (that is, the person who enjoys this advantage) "is to submit to something by reason of his having previously enjoyed this advantage in the shape of repayment of an amount previously paid by way of Excess Profits Duty. Something which is not a profit, but is only a money repayment, something which may not result in a profit, because although trading goes on there is so great a loss on the year that this repayment does not make up the deficit, something which may not be a trading profit, because trading has ceased altogether nevertheless is to be treated as profit and as profit for the year." Then Lord Sumner a little later proceeds: "I think, therefore, that the word 'treated' is an apt word to impose a charge." Then later Lord Sumner says: "The only difficult point in the case, I think, is the effect of transferring the section, which was one of the paragraphs headed 'Income Tax' in the Finance (No. 2) Act, 1915, into the Consolidated Income Tax Act of 1918. The section then becomes one of the Rules applicable to Sch. D, and it has been argued, not without force, that the true charge in the Income Tax Act is to be found in the first clause and that the Rules are only modes of applying the charge previously expressed. The conclusion is drawn that this paragraph, being only a Rule, does not operate to prevent the principle of construction of that charge laid down in *Brown* v. *National*

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Provident Institution (1) from applying and accordingly the repayment is taken out of any charging words. My Lords, if it is right to hold that 'treated as profit' involves chargeability as profit, then the mere fact that these words are words of charge additional to the charge at the commencement of the Schedule does not prevent them from being effectual as a charge or render that part of their full meaning surplusage. All that has happened is that there are two statements as to chargeability and the words 'treated as profit for the year' still contain a specific charge." I rely on that statement as involving this, that the Court must consider the exact language and effect of a provision such as that now in question in r. 7, sub-r. 1. Though the fact that the provision merely appears in one of the Rules and not in a part of the Act which is ostensibly and specifically of a charging character is something which ought to be borne in mind, and even, to some extent, raises the presumption that no charge is intended, yet if the effect on the true construction of the Rule is that it does embody a charge, then the Rule must be construed accordingly. Now I think that r. 7, sub-r. 1, cannot be construed in any other way than as imposing a charge with limitations and qualifications.

The income of the securities in question here is dealt with in the same way as the income of the securities which come within Sch. C. The person—a bank, or other financial agent—is entrusted by the foreign or colonial company with the sums out of which he has to pay the interest on the various bonds, and it is natural and proper that such an agent should be accountable to the revenue, just as in the case of foreign and Colonial Government securities, and that the same system of dealing with the income should be given effect to. It is said that that is merely machinery, but I do not agree. There is involved first the responsibility of the agent, then his relief from responsibility if he pays over the amount of the income tax to the Revenue Authorities, and, finally, the right of either an allowance or repayment in favour of any owner who is under the Act exempt from liability. All these matters go far beyond cases of mere machinery, and I think that the

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(1) [1921] 2 A. C. 222.

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general effect and intention of r. 7, sub-r. 1, is to put these securities, for the purposes material to be considered in this case—that is to say, a method of payment and, where necessary, an allowance of repayment and exemption—on the same footing as the securities, foreign or Colonial Government securities, which I have considered as coming under Sch. C. Rule 7, sub-r. 1, begins by a positive and mandatory provision; I need not read it in detail, but it deals with this type of securities and so forth, and says that where any interest arising out of such securities is " intrusted to any person in the United Kingdom for payment to any persons in the United Kingdom "—that is the exact position so far under Sch. C in these matters—" the same shall be assessed and charged to tax under this Schedule "—that is under D—" by the special commissioners." That finds the Assessing Authority, and it provides that the person to be assessed and charged to tax is the person entrusted, and that therefore imposes the charge on such a person. It is impossible to say that it is mere machinery. Then it proceeds in clause 2: " All the provisions of Schedule C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom, and intrusted to any person (other than the National Debt Commissioners or the Bank of England or the Bank of Ireland) for payment to any persons in the United Kingdom, shall extend to the tax to be assessed and charged under this rule." Now it is to be noticed at once that the extension is without qualification—" All the provisions of Schedule C relating to the tax to be assessed and charged in respect of dividends," and so forth. The argument which has been put forward is that the Rules which are so extended are to be read in a limited sense. If you go back to Sch. C, there are first general Rules applicable to C, and then there are " Rules as to interest, etc., payable out of public revenue to or through the Bank of England or the Bank of Ireland, or by the National Debt Commissioners." These obviously cannot apply to the securities dealt with in r. 7, sub-r. 1, of the Miscellaneous Rules to which I am referring, and they are expressly excepted in r. 7, sub-r. 2. Then there are a number of "Rules as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland, and the National Debt Commissioners are intrusted." These rules are applicable to the income from the securities that I am now dealing with, and they set out the various provisions as to the person being entrusted with the payment, and so forth—provisions of a character to which I have already referred. No doubt all these things are brought in under r. 7, but there is nothing in r. 7, sub-r. 2, which limits the scope and the extension. "All the provisions of Schedule C relating to the tax to be assessed and charged" are to be extended, and I cannot see any reason at all why those general words should not include the General Rules mutatis mutandis. For instance, General Rule 1 (*a*) is: "Tax under this Schedule shall extend to all profits arising from interest, public annuities, dividends and shares of annuities payable in the United Kingdom" and so forth; that is obviously inapplicable. But 1 (*b*) is: "Tax shall be charged by the commissioners designated for that purpose by this Act"; and (*c*): "shall be paid by the persons and bodies of persons respectively intrusted with payment, on behalf of the persons entitled thereto." These are clearly applicable, though, to some extent, they are repeated, as indeed they must be repeated, in r. 7, sub-r. 1. Then we come to r. 2, which I have already read, which contains certain exemptions—in particular, exemption r. 2 (*d*)—and I cannot find anywhere any intention to exclude that General Rule 2 of Sch. C from the category of the provisions of C relating to the tax to be assessed and charged, all of which are to be extended to the securities now in question; I think that is the only fair construction of this rule, giving all weight to the circumstance that it appears where it does. That is not a consideration which outweighs the view I have formed as to the general effect of the rule. It is, however, further contended that this is a different case from that last considered of the foreign and Dominion securities, because the latter were subject to the special exemption under s. 71 of the Finance Act of 1910, and, therefore, it is easier and simpler in a Consolidation Act like the present to construe the exemption in 1918 as having the same effect and scope as the exemption given by the Act of 1910. There is certainly some force in that argument. Prima facie, as I have already said, a Consolidation Act merely consolidates, and, generally speaking, ought to be construed so as not to change the existing law. But it may change the law. It has to be construed according to its own language, and if its language can only be construed in one way, then it must be construed as changing the law. There is every reason why in a case like this all the provisions of Sch. C should apply to the very analogous case of this foreign interest entrusted to a person in the United Kingdom. The position is identical for practical purposes with that in respect of the foreign Government securities. Although I think it is true to say that s. 71 of the Finance Act of 1910 does not deal with these securities at all, still that may have been a casus omissus which the draftsman in framing the Consolidation Act might well have made good when the law was consolidated, as it was in 1918. However that may be, I think that this rule ought to be construed as Mr. Latter has contended, though I do not accept his argument that under the various provisions of the Act of 1853, and so on, it is possible to treat s. 71 of the Act of 1910 as extending to the particular securities of this character.

There is, however, one further point which is of significance, and which, in my opinion, confirms the view which I have arrived at on the construction of the Act of 1918 and of r. 7. In the Finance Act of 1924, s. 27, there is an important provision giving a right of appeal in certain cases from the decision of the Commissioners of Inland Revenue to the Special Commissioners, where the taxpayer is aggrieved by the decision of the Commissioners of Inland Revenue on any question of domicile or residence affecting him. In sub-s. 3 you have this provision: "This section applies to the following questions: (*a*) any question as to ordinary residence arising under subsection (1) of section forty-six of the Income Tax Act, 1918." That, it will be remembered, deals with the question which has already been discussed in this case; the

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language used in the Act is "ordinary residence." Then: "(*b*) any question as to domicile or ordinary residence arising under paragraph (*a*) of rule 2 of the rules applicable to Case IV. of Schedule D, or under paragraph (*a*) of rule 3 of the rules applicable to Case V. of Schedule D." These again are exemptions in which the expression is "domicile" or "ordinary residence." Then: "(*c*) any question as to residence arising (i.) under paragraph (*d*) of rule 2 of the General Rules applicable to Schedule C; or" (and this is the material passage) "(ii.) under rule 7 of the Miscellaneous Rules applicable to Schedule D in connection with a claim for repayment of income tax made to the Commissioners of Inland Revenue by the person owning the stocks, funds, shares or securities and entitled to the income arising therefrom, or entitled to the annuities, pensions or other annual sums, as the case may be, and from whose income a deduction has been made on account of the income tax assessed and charged under the said rule." That provision (*c*) (ii.) treats r. 7 as containing a provision in the terms set out. Now these terms which are set out are the exact terms to be found in General Rule 2 (*d*) of Sch. C, and they can only be found in r. 7 of the Miscellaneous Rules under Sch. D if r. 7 has incorporated in virtue of the provisions of sub-s. 2 the terms of General Rule 2 (*d*) of Sch. C, to which I have just referred, and that is exactly the conclusion that I have arrived at merely on the construction of the rule itself in the Act of 1918. That provision is not merely a statutory confirmation or recognition, as it were, of what the construction of r. 7 was thought or intended to be, because under Part III. of the Act it is, among other things, provided that "Part II. of this Act" (that is the Part in which the section to which I have been referring occurs) "shall be construed together with the Income Tax Acts," and therefore you cannot construe r. 7 without reading into it the provisions of this section of the Finance Act, 1924, to which I have already referred. There is one other section in the Finance Act, 1926, which points to the same conclusion, and it is s. 5 of Part II. of the Second Schedule, which says, sub-s. 1: "Any person who is intrusted with the payment of any interest, dividends or other annual

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payments which are payable to any persons in Great Britain or Northern Ireland out of the public revenue of the Irish Free State or out of or in respect of the stocks, funds, shares or securities of any Irish Free State company, society, adventure or concern shall be relieved from the obligation imposed on him by General Rule 1 of Schedule C and Miscellaneous Rule 7 of Schedule D to pay tax thereon on behalf of the persons entitled thereto as regards any such interest dividends or other annual payments in respect of which he furnishes" a list. Then it is further provided, in sub-s. 3: "Any interest, dividends or other annual payments in respect of which the person intrusted with payment is by virtue of subparagraph (1) of this paragraph relieved from the obligation to pay tax shall be assessable and chargeable under Case IV. or Case V. of Schedule D as the case may be"; that is to say, these securities and the interest on them are expressly taken out of r. 7, just as they are taken out of General Rule 1 of Sch. C, and they are relegated to the position of being the subject of direct taxation instead of subject to deduction by the person intrusted with the payment in England, and again General Rule 1 of Sch. C and Miscellaneous Rule 7 of Sch. D are put on the same footing as, having regard to their identity of character, they should be.

The conclusion I arrive at, therefore, is that r. 7 incorporates among other things the provisions of General Rule 2 (*d*) of Sch. C, and that the same consequences follow from that as follow in the case of the second class of securities with which I have been dealing—that is, the securities of foreign or Colonial Governments. I agree, therefore, on that point with the decision of the Commissioners and of the learned judge.

So much, therefore, for the three specific items which fall under the first main head of discussion in this case. In all these cases, it having been decided that the contention of the Crown was wrong and that the interest was exempt from taxation under the Act of 1918, whether under Sch. C or Sch. D, there remains what Mr. Hills described as the

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second main head, and that is, what is the amount of deduction for expenses which can be allowed in respect of the general trading profits of the bank at its London branch? That turns upon the provisions of Sch. D and certain rules. I am, of course, dealing with Case I. of Sch. D. Case I. of Sch. D is defined in the rule applicable to Case I. in these terms: "The tax shall extend to every trade carried on in the United Kingdom or elsewhere, and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average"; and then in the rules applicable to Cases I. and II. you have this r. 3: "In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation." That is put in negative form, but it is generally, and I think correctly, treated as being capable of being converted into a positive enactment, with the result that it provides that "money wholly and exclusively laid out or expended for the purposes of the trade" may be deducted. So far as I know, these are the only two provisions in the Act which are relevant for the discussion of the novel point which has now been raised. The point is this: The effect of the decision that the interest on the securities in question here should be exempted and excluded is that the assessable profits are reduced by that exemption to the extent of 78,556*l*. The case finds that the expenses which can be attributed to the earning of those profits—that is to the 5 per cent. War Loan and the India Stock and the two Colonial Companies' Securities—are 41,262*l*. It is contended on behalf of the Crown that, if the bank get the benefit of that exemption, they should be deprived of the advantage of deducting this sum of 41,262*l*., being the expenses attributable to the earning of the income which has been held to be immune from taxation. In other words, it is said if the corpus—that is to say, the income—is to be excluded, the accessory—that is to say, the expense of earning it—ought also to be excluded. The exclusion on the one side ought to be balanced by an exclusion on the other, otherwise the taxpayer is getting a double advantage: he is getting his exemption in respect of the interest, and he is also having the additional benefit of deducting the expenses of earning that interest, just as if that interest had been included as taxable. I confess that there seems to be great force in that argument, and if I had been able to find a warrant for giving effect to it in the language of the Act I should certainly have done so, because it seems to me to be both a reasonable and a proper conclusion. The point, as I say, is novel. A number of cases have been cited by Mr. Hills, but I cannot find that they throw any light on this particular question. They are either cases in which it was held that the expenses which were in dispute were not expenses of the trade at all, or, to put it in another form, that they were expenses which appertained not to the trade but to the position of the taxpayer in some other capacity, as, for instance, where the charge appertained to him in his capacity of property-owner or land-owner, or again as in the *Salisbury House* case, to which I have already referred, where it was held that the taxpayer was carrying on two separate and distinct trades, and, therefore, the various exemptions or rules which applied to the one did not apply to the other.

Of the cases in question that have been referred to, there is *John Dow* v. *Merchiston Castle School, Ld.* (1); *Union Cold Storage Co., Ld.* v. *Jones* (2); *Strong & Co., Ld.* v. *Woodifield* (3), and *Commissioners of Inland Revenue* v. *Scottish Central Electric Power Co.* (4) In none of these cases do I find any help for the problem now put before the Court. The expenses which are dealt with here by the Commissioners are interest on the money borrowed and used to purchase these particular securities, and it would be a suitable conclusion if that could be deducted. There are also, however, expenses in respect of the London overhead charges, which, as I gathered from the case, are also included in this figure of 41,000*l*. The case for the Crown can, I think, be put most forcibly in this way, that this particular sum of 78,000*l.* odd is to be taken out of the trade altogether, and treated as if it had never been there at all. It can be taken out of the computation and along with it the cost of earning it should also be excluded, and in that way the trade from both points of view would be considered as if there never had been any such profits at all. But I cannot find in the Act anywhere any provision which would justify any such elimination of a part of the expenses, where, as here, there is only one indivisible trade. It is quite different, as I say, from the cases to which I have referred which Mr. Hills has cited. There is only one trade and we know exactly what are the expenses of that trade, and r. 3 (*a*) of Sch. D provides or it is understood to say, that the expenses of the trade, if the " money is wholly and exclusively laid out for the purposes of the trade," are to be deducted. The result seems to be that the Legislature in the Income Tax Acts has expressly provided for certain exemptions and exclusions which will operate when the profits of the trade are being dealt with under Case I. of Sch. D, and has, either inadvertently or by design, omitted to make any corresponding provision in respect of any allocation or apportionment of the expenses of the trade. In other words, when, for the purpose of taxation under Sch. D, Case I., you come to compute the profits, you have to exclude altogether this 78,000*l.*, because there is, according to the view which the Court here takes, express exclusion of these profits, and that reduces one side of the computation, but when you come to the other task of ascertaining the expenses " wholly and exclusively laid out for the purposes of the trade," you are faced with the total sum, and there is no provision for any apportionment. It may well be that that has followed from the circumstance that these exemptions were introduced at a comparatively late date, and the effect of them was not considered in connection with r. 3. I do not know how that may be, but the short result is that I find no means, consistent with the language of the Act, of giving effect to this contention of the Crown. I think that some such provision ought reasonably

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(1) 1921 S. C. 853; 8 Tax Cas. 149.

(2) (1823-24) 8 Tax Cas. 725.

(3) [1906] A. C. 448.

(4) 1928 S. C. 260; 15 Tax Cas. 761.

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to have been included in the Act, but I simply cannot find it. I have not gone through the various complications which may arise in regard to assessing the profits under Case I. of Sch. D. I am quite content here to limit myself to the particular problem with which the Court is faced and to state the conclusion at which I have arrived.

The result is on the whole case that, in my judgment, the appeal fails and ought to be dismissed with costs.

ROMER L.J. The Master of the Rolls has dealt so fully with the facts and the law of this case that I have very little to add. In the few observations I shall make I propose to deal with the four questions arising upon the appeal in the order in which they have already been dealt with by the Master of the Rolls.

In making my observations on the first of those questions, I would like to begin by a reference to the case of the *Liverpool, London and Globe Insurance Co.* v. *Bennett* (1), because that authority, in my opinion, has a very direct bearing upon the first question. In that case the Court was confronted with the application made by an insurance company resident and trading here amongst whose assets were included certain foreign securities such as are dealt with by Case IV. of Sch. D of the Income Tax Act. The company, however, had not received in the year of assessment any interest from those securities ; the interest had been allowed to accumulate abroad and that being so under the rules of Case IV. of Sch. D, as they then stood, the company was not liable to direct assesssment in respect of any of that interest. In those circumstances the company sought to have excluded from a statement of its profits and gains in its business the interest on those securities which had accrued to it abroad but had not been sent into this country, and they sought to have it excluded on the ground that inasmuch as they were not liable to be charged under Case IV., in respect of that interest, so too they were not liable to be charged in respect of that interest under Case I.

Now, if Mr. Hills' argument on the first point is to be

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accepted, one would have thought that the Court would have disposed of the application of the insurance company in a very short way. They would have said: "Case IV. of Schedule D is dealing with interest. Case I. of Schedule D is dealing with profits and gains of a trade—trading receipts; what have we got to do with interest?" That is not the view they took. They dissected the trading receipts; they discovered that among the trading receipts were these items of interest and they pointed out that those items of interest were dealt with by the two cases, both by Case I. and by Case IV., and that the Crown had an option to charge that interest either under Case IV., as it could, or under Case I.

Now it is perfectly plain, I think, from that case that if the rules of Case IV. had in terms excluded all such interest from all taxation, that interest would equally have been excluded from taxation as a trading receipt under Case I. It would not have been possible for the Crown to say: "It is true it is excluded under Case IV. but we claim that we have the right to tax it as a trading receipt under Case I." But the interest was not exempted from taxation by any of the rules of Case IV; it merely did not fall to be charged under Case IV. because it did not happen to have been received in this country.

Now applying that case to the present one, s. 46 of the Act of 1918 says that the interest on War Loans shall not be taxed—as I read the section—under any Schedule, and in my opinion it is impossible for the Crown to say: "It is indeed exempted from taxation but only from taxation as interest and we can charge it as a trading receipt under Case I." I think they are precluded from raising that point by the very decision in the *Liverpool, London and Globe* case. (1) But apart altogether from authority it appears to me that the words of s. 46 are quite plain and that interest on the War Loan is for all purposes of income tax exempt—in the case, of course, of the non-resident. So much for the first point.

The second point arises under Sch. C in relation to interest on some India Stock, and without any question at all that interest is dealt with in r. 2 of the rules applicable to Sch. C. It is within this description: "Interest on securities of a Foreign State or a British Possession which are payable in the United Kingdom where it has been proved that the person owning the securities and entitled to the interest or dividend is not resident in the United Kingdom." Now it is said on behalf of the Crown that that rule must be read as though it said: "No tax under this Schedule shall be chargeable." The rule in terms says that no tax shall be chargeable in respect of, amongst other things, the interest described in sub-r. (*d*). In my opinion there is no justification for so qualifying the word "tax." In r. 1 we find this: "tax under this Schedule." In r. 3 we find the expression "tax under this Schedule." Rule 2, in contradistinction to those two rules, says: "no tax shall be chargeable." I should have been surprised to find, that in Clause 2 this particular kind of interest was only excluded from taxation under Sch. C because, as has been pointed out by the Master of the Rolls, before the Act of 1918 such interest was excluded from taxation under any and every Schedule by reason of the provisions of s. 71 of the Act of 1910, and, to say the least of it, it is extremely unlikely that when passing the consolidated statute of 1918 and introducing, as it has been introduced by a rule to Sch. C, the provisions of s. 71, the Legislature intended those provisions to have a more restricted operation than they had before.

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I now pass to the third question which, I agree, is a rather more difficult one. That question relates to interest on certain securities, in a Canadian Company and a New Zealand Company respectively. That interest, again, is undoubtedly dealt with by r. 7 of the General Rules to Sch. D. That rule provides as follows: "Where any interest, dividends, or other annual payments payable out of or in respect of the stocks, funds, shares or securities of any foreign or colonial company, society, adventure, or concern are entrusted to any person in the United Kingdom" and so on: "the same shall be assessed and charged to tax under this Schedule by the Special Commissioners." Then follows sub-para. 2: "All the provisions of Schedule C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom, and entrusted to any person"—I leave out immaterial words—"for payment to any person in the United Kingdom, shall extend to the tax to be assessed and charged under this rule." It will be observed that the sub-section does not say: "All the provisions of Schedule C relating to the assessment and charging of the tax" but that all the provisions of Sch. C relating to the tax are to apply.

I turn back once more to r. 2 of Sch. C, r. 2 (*d*). I have already expressed my opinion that that rule provides for complete exemption from taxation of the interest to which it refers. That being so, inasmuch as it is a rule relating to tax under Sch. C it is one of the provisions which applies to the tax that is to be assessed and charged under r. 7 of the General Rules to Sch. D.

It is said by Mr. Hills that before the Act of 1918 came into operation such interest was not exempt in such a case at all because s. 71 of the Act of 1910, for some reason or other, did not extend to interest from securities of colonial companies. That is true. But why interest from colonial companies should be placed in this respect on a different footing from interest from securities of foreign States I do not know, and I cannot help thinking that the omission of such interest from s. 71 of the Act of 1910 was an oversight, and an oversight that was put right and was intended to be put right by the Act of 1918. I have no more to say about that question.

I now come to the fourth question, which is, I think, the most difficult of them all. Two alternative views may be taken on that question, views which I think I can best explain by an illustration. Supposing that a company—a non-resident company trading here—has in a particular year trading receipts amounting to 3000*l.*, consisting of 1000*l.* from War Loan and 2000*l.* from other sources, and supposing that its trading expenses, properly chargeable under Sch. D, Case I., amount in the year to 600*l*., the balance of profits and gains is 2400*l*. On that sum the Crown would be entitled to levy tax, but it will be observed that of that 2400*l*., 1600*l*. may be said to come from sources of revenue other than the interest of War Loan and 800*l*. from interest of War Loan, and when the Crown seeks to lay its hand on the 800*l*. for the purpose of taxing it, the taxpayer may say: "No, section 46 forbids that; therefore you can only tax me on 1600*l*." In other words, the result of s. 46 would be to remove from the company's profit and loss account not the whole 1000*l*. interest on War Loan but the 1000*l*. less its proper proportion of the trading expenses of the company. That is one way of looking at it. The other way of looking at it involves the application of s. 46 at an earlier stage. The application takes place in this way and at this time. When the company is drawing up its profit and loss account, or somebody is drawing it up on its behalf, the moment that amongst the trading receipts is put down this 1000*l*., the company says: "No, that must be removed from the account altogether having regard to section 46 because by reason of section 46 we are, for income tax purposes, to be treated in exactly the same position as though the War Loan we have produced no income at all." The result of that would be, of course, in the illustration I have given, that a company would be taxed under Case I. merely on 1400*l*.

Now I confess that the first of those two alternative views possesses for me a certain attraction. On the other hand, the Master of the Rolls—and Greene L.J., I understand, agrees with him—has taken the view that the second of those alternatives is to be preferred. I am not so enamoured of the first alternative as to differ from them.

In the circumstances I agree with the Master of the Rolls that this appeal fails on all four points.

GREENE L.J. I agree. It is no disparagement to the ingenuity with which the argument for the Crown has been presented to say that to my mind at any rate it is on all four points completely unconvincing.

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I will say a few words of my own with regard to each of the four points which have arisen.

With regard to the first point, the question arises in this way: Sect. 46 of the Income Tax Act, 1918, provides that the interest of certain securities shall be exempt from tax and super-tax. The securities in question are securities which have been issued with a particular condition annexed to them, that condition being "that the interest thereon shall not be liable to tax or super-tax, so long as it is shown, in manner directed by the Treasury, that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom." Now, speaking for myself, I find in that language a perfectly clear legislative provision that, so long as the securities are in the beneficial ownership indicated in the section, no tax is to be levied in respect of the interest upon them. To say, as has been said on behalf of the Crown, that the true effect of the section is merely that the interest is not to be taxed as interest but can be taxed as part of an aggregate of profits of trade, appears to me to override the perfectly plain language of the section. It is a matter of some satisfaction that the construction which I consider should be placed upon the section will enable the perfectly clear undertaking given in the prospectus when this War Loan was issued to the public to be kept both in the spirit and in the letter.

The second point arises under Sch. C, r. 2. The subject-matter with which it is concerned is interest on securities of a British possession, and r. 2 of Sch. C provides that no tax shall be chargeable in respect of that interest in the case of non-residents.

Now, it is to be observed that this particular interest has its proper home in Sch. C. Schedule C is the schedule to which, in the first instance, it is quite plainly appropriate, and it is by that Schedule that this class of interest is in fact taxed. Now, when I find that the Schedule to which a class of income is appropriate and in which it is dealt with says, in terms, that no tax shall be chargeable in respect of that income in certain circumstances, I myself find it quite impossible

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to read those words as meaning simply "no tax shall be chargeable under this Schedule." The fact that the income is by its nature income to which that Schedule is applicable in the first instance makes it impossible to my mind to read the words "no tax shall be chargeable" with any such qualification upon them. When the Legislature wishes to show that an exemption in a schedule is to be limited to the tax chargeable under that Schedule, it does so in plain terms, as indeed it has done in r. 3 of Sch. C. In my opinion the second point also fails.

The third point arises in this way. By r. 7 of the Miscellaneous Rules to Sch. D: "All the provisions of Schedule C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom" are to apply to what, for convenience, I will shortly call the dividends of foreign companies. I agree that it is sufficient to conclude this matter to observe that the language of para. 2 of r. 7 is, as my brother Romer has pointed out, to this effect, that all the provisions of Sch. C relating to the tax to be assessed and charged are to apply, and when I turn back to Sch. C and see what are the provisions relating to the tax to be assessed and charged, one of them is unquestionably r. 2. In addition to the matter of exemption which is provided for there, it is worth calling attention to this circumstance, that one of the provisions of that rule in Sch. C in relation to the tax is that which provides for the manner in which the exemption is to be given effect to—namely, by allowance or repayment on a claim being made to the Commissioners of Inland Revenue. For my part it appears to me that the language of r. 2, taken by itself, is quite sufficient to decide the question, but if the matter be examined a little further this conclusion is, I think, confirmed.

Mr. Hills contended that the only effect of para. 2 of r. 7 was to import a particular set of provisions relating to assessments which are headed in Sch. C, "Rules as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland and the National Debt

Commissioners are entrusted." He then went on to say that under the second of those rules the Special Commissioners, when they are busying themselves with the assessment of the paying agents can, and indeed, if they have sufficient information, should exempt from the charge any dividends payable to what, for convenience, I call a non-resident, and should do that not by virtue of any express exemption collected from Sch. C but because by Sch. D itself the tax is limited to non-residents.

I have not myself heard it explained with regard to that last point why it is that the words should not be sufficient to bring under charge to tax dividends payable to non-residents, in view of para. (*b*) of para. 1 of Sch. D in which there is no mention of residence at all, and Case VI. However that may be, the result will work out, according to Mr. Hills' argument, in this way, as I understand it. The Special Commissioners are assessing the paying agents. They will not—and it is common ground that they will not—in probably the majority of cases have before them the information as to the ownership of the securities which would enable them to give effect to any exemption which an owner is entitled to on the ground that he was a non-resident. They will, therefore, assess the paying agent in respect of the amount which he is to pay over to the owner of the shares.

Now what is to happen ? According to Mr. Hills' argument, the remedy of the taxpayer who is aggrieved by that decision is not a remedy which is governed by Sch. C at all but is a remedy based on the fact that he has been improperly assessed to tax or, rather, his dividend has been improperly assessed to tax because under Sch. D it ought never to have been assessed at all. Now mark what would happen. His right would apparently be to obtain repayment by a Petition of Right and the issue of residence or non-residence would be an issue of fact to be decided by the Court. Unless and until he has recovered his tax it would be quite impossible for the Crown, while the assessment of the paying bank in respect of that dividend stands, to raise a fresh assessment against the shareholder under Case I., because you would then have standing at one and the same time in respect of one and the same piece of income two assessments. The way it will work out, according to Mr. Hills' argument, in practice would be this, that the assessment under Case I. of the non-resident proprietor, who has obtained repayment, either because the Commissioners are satisfied without litigation or as the result of litigation, would then fall to be revised, in order to bring into it an item of income which obviously could not have been brought into that assessment before because it had already been taxed. That would still leave this curious position, that there would still be on foot in respect of the same piece of income two assessments, because the effect of repayment to the proprietor of the tax deducted from his dividend would not be to revise or displace the original assessment, and you would get the anomalous position, as I say, of two existing assessments standing in respect of the same piece of income.

I, for my part, find it impossible to suppose that that is a result which the Legislature was contemplating. Whether or not the previous legislation had the effect of importing r. 2 (*d*) of Sch. C by reference into the provisions of r. 7 of the Miscellaneous Rules I do not find it necessary to determine. In my judgment that rule is quite clearly imported by the Consolidation Act of 1918, and if that be the case the way the machinery will work will be this: The assessment having been made upon the paying agent, the non-resident proprietor can avail himself of the machinery provided in r. 2 (*d*) of Sch. C, by proving to the satisfaction of the Commissioners of Inland Revenue the fact of his non-residence and then obtaining relief by way of allowance or repayment. That that is what the Legislature intended is, in my opinion, made quite clear when the Finance Act of 1924 is examined. Under s. 27 of that Act a new right of appeal to the Special Commissioners was given from a decision of the Commissioners of Inland Revenue. It is to be observed that the right is a right to appeal from a decision. When the decisions with which the section deals are examined, omitting for the moment the one relevant to this point, it will be found that each and every one of them is a decision of the Commissioners of Inland Revenue under a statutory power given to them in the Act to decide the issue of fact, residence or non-residence, domicile or non-domicile, as the case may be. Therefore, it appears to me extremely unlikely that in such a context you will find a right of appeal given—as Mr. Hills would have us construe the paragraph to which I am about to refer—not from a decision of the Commissioners given in the exercise of a statutory jurisdiction to decide a matter of fact but from some administrative refusal to repay tax which has been improperly levied.

I myself find it quite impossible to read the section in that way. The section is dealing with decision and decision means prima facie a decision of an express character under some power to decide, and that power is found in each of the other cases.

The case in question here gives a right of appeal from a decision of the Commissioners with regard to any questions as to residence arising, firstly, under para. (*d*) of r. 2 of the General Rules applicable to Sch. C or, secondly, under r. 7 of the Miscellaneous Rules applicable to Sch. D in connection with a claim for repayment of income tax made to the Commissioners of Inland Revenue by the person owning the stock, etc., from whose income a deduction has been made on account of the income tax assessed and charged under the rule. That language shows, to my mind, as clearly as anything can show, that the procedure to which reference is being made and in respect of which a right of appeal is being given, is a procedure in which, tax having been assessed on and paid by the paying agent, the owner of the share then makes, to the Commissioners of Inland Revenue, a claim for repayment, upon which claim the Commissioners of Inland Revenue have under the existing legislation a power to give a decision, and it is from that decision that the right of appeal to the Special Commissioners is granted.

Now that exactly fits the language of r. 2, para. (*d*), of Sch. C, because under that rule the obligation of the shareholder who seeks repayment is to prove the fact of non-residence to the satisfaction of the Commissioners of Inland Revenue; in other words, they are the people who have the statutory power to decide that matter of fact. The manner in which the exemption is given effect to under that rule is by way of repayment of tax, words which appear again in s. 27, sub-s. 3 (*c*), of the Act of 1924. Indeed, when the language is appreciated the whole matter to my mind fits together, both from the point of view of substance and from the point of view of machinery. It is worth observing that when the Legislature by s. 10 of the Income Tax Act, 1853, extended to this class of dividend the machinery which had previously been applicable to the case of interest of foreign or Colonial Government Loans, it was bound to bring it into charge under Sch. D, because the language of Sch. C which is confined to interest payable out of public revenue would not have been apt to cover it and if it was to have been brought under Sch. C, Sch. C would have had to be amended for that purpose. Sch. D was the appropriate schedule in which to put it, but the Legislature, having regard to the close correspondence between the circumstances of the two cases, when they brought it into Sch. D made it subject to the provisions of Sch. C with regard to the matters appropriate to Sch. C, and that, to my mind, is the history of the matter. Whether or not before the Act of 1918 there was some gap in that correspondence is beside the point. In my opinion the correspondence, if it was not perfect before, was made perfect by the Act of 1918.

That brings me to the last point, the question of expenses. The argument for the Crown on that point is of this nature, that in the account of a trading company made out for the purpose of its return under Case I. of Sch. D the interest with which we are concerned must, in the first instance, be brought into the account as an item of receipt; and that the statutory provisions which exempt the interest from tax are to be given effect to by then removing altogether that item from the statement of profits and gains and removing with it something which clings to it in the process of removal, namely, some apportioned part of the expenses of the company. Now

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I can find no warrant whatever in the language of the statute to produce that result. When the statute says that interest is to be exempt I am quite unable to read it as meaning that in giving effect to that exemption by implication some repercussion is to take place on a different provision of the Act altogether. It seems to me quite improper to read any such implication into it. Mr. Hills says, and says with truth, that there are many cases in the working of the Act where it is necessary to make apportionments, and he instances as one the case where a non-resident company carries on businesses both in England and abroad and its accounts have to be dissected in order to bring in only that part of the business which is appropriate for the purpose of taxation. That is perfectly true, and the reason why the dissection has to be made there is that the statute quite clearly requires it and cannot be effective unless it is made. But in this case I can find nothing in the statute which requires this interest to be treated, so to speak, as a trade within a trade. This is really what the Crown contends, that in some way this interest which is to be brought into the account as an item of receipt is to be taken out of it with some apportioned expenses appropriated to it as though it were a trade by itself. If the Legislature had intended that, in my opinion, it should have said so, and I am quite unable to construe the language of the relevant exemption clauses—because the suggested result can only arise from an implication from those clauses or a qualification upon them—in the way contended for.

I agree that the appeal fails on all points and should be dismissed with costs.

Solicitors : *Solicitor of Inland Revenue ; Linklaters & Paines.*

H. L. L.

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Practice—Representation order—" Persons having the same interest in one cause or matter"—Trade union—Action for price of goods supplied to members—Action for declaration that sum claimed was due to plaintiff by members of trade union and was payable out of funds of Lodge—Action against officials as representing general body of members—Majority of members changed since goods supplied —Writ and representation order set aside—R. S. C. Order XVI., *r.* 9.

In 1921, 89 out of 1093 members of a Lodge, which was a branch of the Durham Miners' Association, a registered trade union, received goods from the plaintiff, such goods being supplied upon a form of voucher signed by the then secretaries of the Lodge and bearing the Lodge stamp. Between 1922 and 1930 the plaintiff received from the treasurer of the Lodge various payments on account. In August, 1936, he commenced an action against the chairman, treasurer, general secretary and financial secretary of the Lodge as representing the general body of members of the Lodge claiming a declaration that the balance of the price of the goods was due and owing to the plaintiff from the members of the Lodge and was payable to him out of the funds of the Lodge. The plaintiff then applied for and obtained an order under Order XVI., r. 9, that the defendants should defend the action on behalf of the Lodge. It appeared that the majority of the members of the Lodge in 1921 had now ceased to be members, and that the majority of the members of the Lodge at the present time were not members in 1921, that members who were infants had no voting powers, and only 19 out of the 89 members to whom the goods were supplied were now members of the Lodge. The rules of the Association did not provide for the supply of goods to members. The judge in Chambers set aside the writ and the representation order. On appeal:—

Held, that the representation order ought not to be made, as the various members of the Lodge had different interests and different defences in the cause or matter.

Dictum of Lord Parker of Waddington in *London Association for Protection of Trade* v. *Greenlands, Ld.* [1916] 2 A. C. 15, 39, applied and followed.

Ideal Films, Ld. v. *Richards* [1927] 1 K. B. 374 distinguished.

APPEAL from an order of Greaves-Lord J. sitting in Chambers.

On August 12, 1936, the plaintiff H. T. Barker issued a writ in the Durham District Registry against J. R. Allanson, J. H. Tate, L. E. Raine and J. Keenan, as representing the general body of the members of the Chilton Colliery Lodge of the

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Durham Miners' Association, claiming the sum of 135*l.* 18*s.*, the balance of the price of goods sold and delivered to various members of the said Lodge at the request and to the order of the said Lodge. According to the particulars annexed to the statement of claim indorsed on the writ the value of the goods supplied by the plaintiff between May 27 and July 8, 1921, amounted to 432*l.* 5*s.* He gave credit for some twelve payments on account made between April 12, 1922, and August 18, 1930, amounting to 290*l.* 7*s.*, and four payments made by a man named Ord amounting to 6*l.* The plaintiff in para. 2 of his affidavit said that " the goods referred to in the statement of claim indorsed on the writ were supplied by me at the request and to the order of the Chilton Colliery Lodge. I gave credit to the said Lodge and not to any individual member thereof. Most of the persons to whom goods were supplied were quite unknown to me and I would not have supplied them with goods without the order of the said Lodge." The form of order on which the goods were supplied was as follows :—

" 692.

Chilton Miners' Lodge.

No........... 10.6.1921.

Please supply bearer, Mr. A. Robson................

with { groceries / meat } to the value of...............pound, five shillings.

This ticket is invalid unless embossed with Lodge stamp.

Thos. E. Barron and T. Bellas,
Secretaries.

£ : 5*s.* *d.*"

On August 20, 1936, on the application of the plaintiff a representation order was made by the Registrar of the Durham District Registry and it was thereby ordered that the defendants should defend the action for and on behalf of the Chilton Colliery Lodge of the Durham Miners' Association, and the writ and representation order were served on the defendants on August 26, 1936.

A conditional appearance was entered on behalf of the defendants on August 31, 1936, and a summons was taken out on behalf of the defendants to set aside the writ in the action and the service on the four defendants and the representation order and all subsequent proceedings for irregularity. This application was refused by the Registrar on October 26, 1936.

On October 26, 1936, the plaintiff's statement of claim indorsed on the writ was amended, and as amended it claimed "against the defendants as representing the general body of the members of the Chilton Colliery Lodge of the Durham Miners' Association *a declaration that the sum of* 135*l.* 18*s.* the balance of the price of goods sold and delivered to various members of the said Lodge at the request and to the order of the said Lodge *is due and owing to the plaintiff from the members of the said Lodge and is payable to the plaintiff out of the funds of the said Lodge.*" The amending words are in italics.

The defendants appealed to Greaves-Lord J. sitting in Chambers, who on November 12, 1936, made an order setting aside the writ of summons in the action and the service on the defendants, the representation order made on August 20, 1936, and the service on the defendants, and all subsequent proceedings for irregularity.

It appeared from an affidavit sworn by the four defendants, who were all miners, that the Chilton Colliery Lodge was a branch of the Durham Miners' Association, which was a registered trade union. Of the four defendants Allanson was the financial secretary, Tate the treasurer, Raine the chairman, and Keenan the general secretary of the Chilton Colliery Lodge. At the present time there were 841 members of the Lodge. In 1921 there were 1093 members of the Lodge. The membership of the Lodge had changed since 1921, and the majority of those who were members in 1921 had ceased to be members, and the majority of those who were now members of the Lodge were not members in 1921. In 1921 the defendant Allanson was not a member of the Lodge, Tate was the treasurer of the Lodge, Raine was an infant, seventeen years of age, and a half-member of the Lodge, with no powers of voting, and Keenan, although a member of the Lodge, was not an officer thereof. In 1921, 89 out of the 1093 members received

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goods from the plaintiff, such goods being supplied upon a form of voucher signed by the then secretaries of the Lodge and bearing the Lodge stamp. Of the 89 persons some had died, some had paid for the goods which they had received and some had ceased to be members of the Lodge, and only 19 of the 89 persons were still members of the Lodge. There were no trustees of the funds of the Lodge, which comprised the balance from time to time outstanding of the subscriptions of the members, and the liability of the members could not exceed the liability for their subscriptions. The payments referred to in the statement of claim were not made out of the Lodge funds but in consequence of arrangements which were made between the individual receivers of the goods and the treasurer, J. H. Tate, and the plaintiff, and such amounts as were received by Tate from such individuals were paid to the plaintiff, and the defendants had no funds and the Lodge had no funds in their or its possession, custody or power which could be lawfully applied in payment of the claim made by the plaintiff. The only moneys paid with the authority and consent of the members of the Lodge consisted of subscriptions which were paid by the members for the specific purposes provided for in the rules of the Durham Miners' Association, and the treasurer had no authority and had never had any authority to deal with such moneys for purposes other than those referred to in such rules.

The plaintiff appealed against the order of the judge in Chambers setting aside the writ, the representation order, and all subsequent proceedings.

J. Charlesworth for the appellant. The decision of the judge in Chambers was wrong. The representation order was properly made under Order XVI., r. 9, of the Rules of the Supreme Court. (1) In *Wood* v. *McCarthy* (2) a representation order authorizing one or more persons to defend on behalf of all persons interested, was made against the will of the person or persons so authorized. In order to obtain a representation order in the present case it is only necessary that the members of the Lodge have equal shares in the funds of the Lodge. It has been decided that a judgment can now be obtained against a fund. In *Ideal Films, Ld.* v. *Richards* (1) a representation order was obtained against the committee of an unregistered association directing that they should defend on behalf of all the members an action for the hire of articles supplied, and the plaintiffs claimed to join as defendants to the action certain persons in whom property belonging to the association was vested as trustees, it being made clear that they were only being sued in their capacity as trustees, no claim being made against them personally, and it was held that in the circumstances the plaintiffs were entitled to join them. That decision of the Court of Appeal is a direct authority in favour of the appellant in the present case. In *Walker* v. *Sur* (2), which will be relied upon by the respondents, it was held that the plaintiff was not entitled to a representation order under Order XVI., r. 9. But that was an action for debt, and further Vaughan Williams L.J. did not think that the four persons selected as defendants had any particular fitness to act as representative defendants, they being only four ordinary members selected at random and not members of a committee nor trustees of the Society. In the present case the action is for a declaration, and the four persons selected as representative defendants are the officers of the Lodge. *Walker* v. *Sur* (2) was cited to the Court of Appeal in *Ideal Films, Ld.* v. *Richards* (1), and the Court altered the statement of claim as originally framed from an action for debt to a claim for a declaration of right. In *Hardie & Lane, Ld.* v. *Chiltern* (3) the action was not to enforce a right against a fund in which all the members of the Motor Trade Association had a common interest, or to declare the interpretation of regulations binding on them in common; but it was to enforce a strictly personal liability against the named defendants and the whole of the members of the Association. It was therefore impossible that the named defendants could adequately represent for the purposes of defence the different individual members of the Association, since those individuals might have defences separate and distinct from the named defendants and of each other, and accordingly the representation order was refused. In the present case the action is not brought to enforce a claim against the individual members of the Lodge, but it is sought to obtain a declaration that the sum claimed is payable out of the funds of the Lodge. The members of the Lodge have a common interest in the funds of the Lodge, and the persons selected as representative defendants are proper persons to represent the fund and therefore the representation order ought to be made.

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(1) By Order XVI., r. 9, of the Rules of the Supreme Court: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

(2) [1893] 1 Q. B. 775.

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(1) [1927] 1 K. B. 374.

(2) [1914] 2 K. B. 930.

(3) [1928] 1 K. B. 663, 699.

G. Norman Black for the respondents. It is a condition precedent to the making of a representation order under Order XVI., r. 9, that there are numerous persons having the same interest in one cause or matter. If that condition is satisfied the judge has a discretion whether or not he will make the order. In the present case the present members of the Lodge have not a common interest in the plaintiff's claim. Where there are different defences open to different defendants there is no common interest in one cause or matter within the rule: *London Association for Protection of Trade* v. *Greenlands, Ld.*, per Lord Parker of Waddington. (1) There has been a great lapse of time between the ordering of the goods and the commencement of the action, with the result that there has been a great change in the membership of the Lodge. The plaintiff must prove that the defendants themselves, or some persons acting for and on behalf of all the members of the Lodge, gave the order for the goods. Those persons who joined the Lodge subsequently cannot be liable upon such an order. The plaintiff must show that he is entitled to a declaration of liability against all the members of the Lodge before he can obtain a declaration that the sum claimed is payable out of the funds of the Lodge. The plaintiff must

(1) [1916] 2 A. C. 15, 39.

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show that each member of the Lodge either expressly or by implication authorized the giving of the order. It is clear that there are different issues affecting different classes of members. The majority of the 891 persons who are members of the Lodge at the present time were not members when the order for the goods was given. There are various classes of members: (1.) The members who received the goods—these are liable individually; (2.) The officers of the Lodge who were parties to the giving of the order; (3.) Those who were members of the Lodge at the time the goods were ordered and supplied—these can only be held liable if it is proved that they ratified the order; (4.) Those who were infants at the time the goods were ordered and supplied and under the rules of the Association had no voting powers; (5.) Those who have joined the Lodge since the goods were ordered and supplied and who form the majority of the members. This Association is carried on on a cash basis, current outgoings have to be paid for out of the cash balance of the Lodge, and if the outgoings exceed the balance the deficiency has to be met by a levy on the members or the outgoings must be cut down. There is nothing in the rules of the Association to show that the subscriptions of new members can be made liable in order to pay for goods supplied many years ago. The rules provide for a cash allowance to members ceasing work, but there is no authority under the rules for the officers of a Lodge to supply goods to its members. In the present case there are several classes of members with different interests and having different defences to the claim. Some could rely on the defence of infancy, some on the Statute of Limitations, and those who joined the Lodge subsequently to the giving of the order could not be held liable. In *Mercantile Marine Service Association* v. *Toms* (1), which was an action for libel, the numerous persons who were members of the Association and whom it was sought to make defendants by representation had not the same interest in the cause or matter, and the representation order was refused. In *Ideal Films, Ld.* v. *Richards* (2) it was assumed that all the defendants had the same interest; it was alleged in the statement of claim that the members of the Association had a common interest in the funds of the Association, and that allegation was not denied. It was assumed that all the defendants were liable or none at all. Different defences were not raised. The present case on its facts does not come within the decision of *Ideal Films, Ld.* v. *Richards*. (1) Under Order XVI., r. 9, the judge has a discretion whether or not he will make a representation order: see *Walker* v. *Sur*, per Vaughan Williams L.J. (2) Greaves-Lord J. has exercised his discretion in the present case, and that discretion ought not to be reviewed.

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(1) [1916] 2 K. B. 243.

(2) [1927] 1 K. B. 374.

J. Charlesworth replied.

Cur. adv. vult.

1936. Dec. 18. The following judgments were read:—

GREER L.J. On August 12 of this year, 1936, the plaintiff issued a writ against John Robert Allanson, John Henry Tate, Lawrence Edmond Raine, and James Keenan (on behalf of the Chilton Colliery Lodge of the Durham Miners' Association). The writ was served on the defendant John Robert Allanson on August 24, on the defendant John Henry Tate on August 27, on the defendant Lawrence Edmond Raine on August 28, and on the defendant James Keenan on August 27. The Chilton Colliery Lodge is not an incorporated society, nor is it a trading partnership. It is not a legal persona; as used in the statement of claim "the Chilton Colliery Lodge" must be treated as meaning all the members of the Lodge at the date of the issue of the writ. On August 20 the High Court District Registrar, on the plaintiff's application, made an order under Order XVI., r. 9, that the defendants named in the writ should be sued as representing all the members of the Lodge. If the order of the Registrar was lawfully made within the provisions of the rule, all the persons who were members of the Lodge at the date of the issue of the writ became defendants to the action to the same extent and with the same consequences as if they had been named defendants in the writ. As there were 841 members of the

(1) [1927] 1 K. B. 374.

(2) [1914] 2 K. B. 930, 934.

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Lodge it would have been impracticable and highly inconvenient to require that the plaintiff should name all of them defendants to the writ. The defendants entered a conditional appearance to the writ and then applied to the Registrar to set aside the representation order. Order XVI., r. 9, is in the words following: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." At the date of the Registrar's order the writ was indorsed as follows: "The plaintiff's claim is against the defendants as representing the general body of the members of the Chilton Colliery Lodge of the Durham Miners' Association for 135*l*. 18*s*., the balance of the price of goods sold and delivered to various members of the said Lodge at the request and to the order of the said Lodge." When the defendants applied to set aside the representation order the statement of claim indorsed on the writ was amended as appears in red ink. No question is raised in this appeal as to the validity of the amendment made at the suggestion of the Registrar. Of the 841 persons who were members of the Lodge at the date of the writ the majority had joined since the goods supplied by the plaintiff were ordered in 1921, and of the 89 persons who received goods from the plaintiff only 19 were members of the Lodge at the date of the writ. The orders for the goods were in the following or similar words:—

"692.

Chilton Miners' Lodge.

No........... 10.6.1921.

Please supply bearer, Mr. A. Robson................

with {groceries / meat} to the value of................pound, five shillings.

This ticket is invalid unless embossed with Lodge stamp.

Thos. E. Barron and T. Bellas,
Secretaries.

£ : 5*s*. *d*."

It is indisputable that only the persons who as members of the Lodge had authorized the order given by the secretaries in 1921 could be made liable in an action for goods sold and delivered. The plaintiff's case as appears from his affidavit in opposition to the defendants' application, and from the particulars to the statement of claim, was that he could treat the existing members of the Lodge as liable for the unpaid balance of goods ordered in 1921. Para. 2 of the plaintiff's affidavit makes it quite clear that his claim was for the balance of the price of goods sold and delivered to the several members of the Lodge on the orders given by the secretaries of the Lodge in 1921, i.e., on the credit of the persons who were then members of the Lodge. This paragraph reads as follows: " The goods referred to in the statement of claim indorsed on the writ were supplied by me at the request and to the order of the Chilton Colliery Lodge. I gave credit to the said Lodge and not to any individual member thereof. Most of the persons to whom goods were supplied were quite unknown to me and I would not have supplied them with goods without the order of the said Lodge. A copy of the form of order on which I supplied the said goods is now produced to me marked ' A '." The Registrar refused to discharge the representation order. The defendants appealed to the judge in Chambers, who reversed the decision of the Registrar and ordered (1.) that the writ of summons and the service thereof be set aside, (2.) that the representation order and the service thereof be set aside, and (3.) that all subsequent proceedings be set aside for irregularity with costs to be paid by the plaintiff to the defendants.

The plaintiff now appeals from the judge's order. I am satisfied that the judge's order in so far as he ordered the representation order to be set aside is right and ought not to be reversed. I am not quite satisfied that the judge was right in setting aside the writ and subsequent proceedings. The defendant Tate was a member and treasurer of the Lodge at the date when the goods were ordered by the secretaries on behalf of the then members of the Lodge, and he might be proved at the trial to be one of those who authorized the giving of the orders in 1921 and the subsequent payments on account. The plaintiff may be able to prove this at the trial and get, for what it is worth, a judgment against the defendant Tate. But no point of this kind was made by Mr. Charlesworth, who argued the case on behalf of the appellant. The only ground on which he argued that the appeal should be allowed was that the representation order was right. He seems to have conceded that if the judge was right in setting aside the representation order he could not and did not complain about the rest of the judge's order. Under these circumstances I do not think we are entitled to set aside the consequential order made by the learned judge on the ground above indicated, as we have heard no argument on the question.

I read the statement of claim indorsed on the writ as a claim for two declarations: (1.) that the present members of the Lodge, i.e., the 841 individuals who were by representation made defendants to the action by the Registrar's order, are liable to pay the sum of 135*l.* 18*s.* as the balance of the price of goods ordered by the 1921 secretaries on their behalf and with their authority, and (2.) a declaration that the defendants are entitled to resort to the funds of the Lodge, i.e., the funds of the 841 members, for payment of the sum so claimed to be due from these members. It is plain that all the defendants by representation have not the same interest in the cause. The majority of these defendants would, if they had been named as defendants, have been entitled to prove that the goods were not ordered by them or with their authority, as they were not members of the Lodge in 1921, others might have been able successfully to plead the Statute of Limitations by proving that they had no part or lot in the payments that were made from time to time, while others might have no answer to the claim. The present case is one to which the law as laid down by Lord Parker of Waddington in his speech in the *London Association for Protection of Trade* v. *Greenlands, Ld.* (1), is certainly applicable, where he said: "In other words, there might be separate defences open to some members of the association and not to others, and if this were so there would be no common interest within the rule. Moreover, when the appearance was entered Shand Kydd was a member of the association, and, he being the person to whom the communication complained of was made, might very well contend that he could not be held liable for a communication to himself. Lastly, if an order could have been made at all it must have been confined to authorizing Sir Samuel Scott to defend on behalf of himself and those who were members of the association at the date of the alleged libel. Those who had become members since that date could not be liable at all."

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(1) [1916] 2 A. C. 15, 39.

It was contended for the appellant that the decision of the Court of Appeal in *Ideal Films, Ld.* v. *Richards* (1) was a parallel case to the present, and an authority for the proposition that the Registrar's order was right. There is nothing in the facts as pleaded in that case inconsistent with the defendants by representation having all been members of the unincorporated Society at the time the films were supplied. It was not suggested by the respondents' counsel that the defendants by representation were not members at the time the films were ordered, or that any of them had defences different from the others. I understand the case as deciding that if all the proposed defendants by representation are proved to be liable to pay a debt to the plaintiffs, a further order may be made directing trustees of the funds of those defendants (who ex hypothesi have a common interest in defending the action) to pay the amount of the defendants' debt out of the property and assets of the defendants. In my opinion the decision has no bearing on the question we have to determine, except in so far as it assists the respondents in their contention that before an order can be made for payment out of the funds of the unincorporated Society there must be a finding that the debt is due from the members of the Society.

For the reasons above stated I am of opinion that the appeal should be dismissed with costs.

(1) [1927] 1 K. B. 374.

SCOTT L.J. I agree with the judgment of Greer L.J., which I have read and considered.

Before deciding in any particular case whether a representative order under Order XVI., r. 9, should be made in regard to defendants, it is necessary to consider two questions: (1.) What is the cause of action? and (2.) What is the precise class of potential defendants who are to be represented by the defendants on the record for the purpose of imposing liability on them if judgment is given for the plaintiff? The vital thing to remember is that judgment against representative defendants means judgment against each individual person covered by the representation. It is because of this consequence of a representative judgment that the conditions upon which an order to represent may be made are those laid down by Lord Parker in the passage from his opinion in *London Association for Protection of Trade* v. *Greenlands, Ld.* (1), which Greer L.J. has quoted. The reason why the position of all represented defendants must be the same as that of those who represent them is simply because that is the hypothesis on which alone such an order is authorized by the rule. The rule is not a device for enabling a plaintiff to have an inquiry conducted by the Court for the purpose of drawing up a list of persons who may, or may not, be liable to him in respect of the cause of action alleged on the writ, and then deciding whether they are liable or not. Its purpose is strictly confined within the limits I have stated.

In the present case the form of relief claimed is a declaration, but the cause of action, on which the Court would base its declaration, is a claim for the price of goods sold and delivered to the various members of the Lodge who in the year 1921 received and consumed the goods. Construed on the principles I have stated the representative order made was accordingly one which enabled the plaintiff through the named representatives to sue all the individual members who had authorized the purchase of the goods supplied, and to get a judgment enforceable against them—so far as the word "enforceable" is applicable to a declaratory judgment. Unless all the persons

(1) [1916] 2 A. C. 15, 39.

so to be represented by the named defendants stood in the same position *vis-à-vis* the plaintiffs as the named defendants, they would not be really "represented" by them, and therefore could not come within the meaning of the rule. It follows necessarily, for the reasons stated by Greer L.J., that the representative order as made was limited in its application to those individuals who were still members of the Lodge at the date when the writ was issued, and also had been members in 1921, and then as members could have authorized the ordering of the particular lots of the goods in question. For the purposes of our decision it is enough to say that, when the representation order was made, there were 841 members of the Chilton Colliery Lodge, but the majority of these had joined since 1921 and consequently had had nothing to do with the ordering of any of the plaintiff's goods at that time. In 1921 there were 1093 members, but only 89 of these received goods from the plaintiff—of these 89 some had died, some had ceased to be members, some had paid for their goods; and only 19 out of the 89 were still members at the date of writ issued. Even amongst these there may have been legal differences of position in regard to the Statute of Limitations, etc. The result, in my opinion, is that there was so little identity of position as between the representing and the represented defendants, that I do not think there was any ground for a representative order at all: a fortiori we could not interfere with the discretion of the learned judge.

I think it is perhaps desirable to add that we are not prejudging a wholly different type of case which may conceivably arise some day in the event of a trade union or friendly society or a club having a rule which (*a*) authorizes the distribution of goods by way of assistance in kind; and (*b*) treats the cash cost of supplying the goods as a charge upon the general fund of the changing body of members. If the Rules of the Durham Miners' Association had contained a rule authorizing the officers of the Lodge in their discretion, instead of granting money allowances to the members, to purchase equivalent amounts of goods and give assistance in kind to the members, with a further provision that the cost of paying for the goods should be a charge on the Lodge funds and defrayed by the members for the time being when money was wanted for such payments, irrespective of the question whether they had been members or not at the time when the goods were bought, different considerations would be present. That question, however, does not arise in this appeal because there is no such cause of action alleged in the statement of claim, nor for that matter is there any rule, at any rate in express terms, having any such effect: and I express no final opinion upon that hypothetical case.

GREER L.J. Eve J. has not thought it necessary to write a judgment, but he agrees with the judgments that have been delivered by the other members of the Court.

Appeal dismissed.

Solicitors for appellant: *Sayer, Ledgard & Smith, for Thomas Jennings & Haggie, Bishop Auckland.*

Solicitors for respondents: *T. D. Jones & Co., for Ronald Williams, Durham.*

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Nov. 26; Dec. 18.

ATTORNEY-GENERAL *v.* COHEN AND ANOTHER.

Revenue—Stamp duty—Conveyance on sale—Sale by auction by same vendors to same purchaser of land in several lots—Series of transactions—Finance (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 73—*Information—Procedure under Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 5.

At a public sale by auction of dwelling-houses offered in twelve lots, the respondents bought from the same vendor six lots at prices, in two cases exceeding 500*l.*, and in four cases not exceeding 500*l.*, in respect of each lot, but in the aggregate exceeding 500*l.* Six contracts of sale were signed by the respondents, each separately stamped. Six deposits were paid and six separate abstracts of title were supplied, in respect of the six lots so purchased:—

Held (Romer L.J. dissenting), that each sale did not form part of a larger transaction or of a series of transactions in respect of which the aggregate amount or value of the consideration exceeded 500*l.*, within the meaning of s. 73 of the Finance (1909–10) Act, 1910, and, therefore, that, in the four cases where the consideration did not exceed 500*l.*, the double tax thereby imposed was not payable.

Decision of Lawrence J. [1936] 2 K. B. 246 affirmed.

Observations with regard to the method of procedure under which the question was submitted to the Court.

APPEAL from a decision of Lawrence J. (1)

Special Case stated by consent under Order XXXIV., r. 1, and Order LXVIII., r. 2, proceedings having been commenced by writ of subpœna, whereby the informant claimed a penalty under s. 5 of the Stamp Act, 1891.

At a public auction held at Newcastle-on-Tyne on September 27, 1934, certain dwelling-houses and other premises were offered for sale in twelve separate lots belonging to different vendors. At the auction the defendants' bids in respect of lots 3, 4, 5, 6, 7 and 8, all of which belonged to the same vendors, were accepted. The defendants' separate bids were made in respect of each lot separately and each of the said lots was separately sold to the defendants.

Lots 6 and 8 were each sold for more than 500*l.*, the remaining lots being sold for less than 500*l.* each. Six separate formal contracts of sale in respect of the six separate lots were

(1) [1936] 2 K. B. 246.

signed by the defendants, and six deposits of 10 per cent. of the purchase price were paid by them. Each of the contracts of sale was separately stamped. Six separate abstracts of title were supplied to the defendants' solicitors.

Sect. 73 of the Finance (1909–10) Act, 1910, provides: "The stamp duties chargeable under the heading 'CONVEYANCE OR TRANSFER on Sale of any Property' in the First Schedule to the Stamp Act, 1891 (in this Part of this Act referred to as the principal Act), shall be double those specified in that Schedule: Provided that this section shall not apply to . . . . a conveyance or transfer where the amount or value of the consideration for the sale does not exceed five hundred pounds and the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds five hundred pounds."

Four separate conveyances of the said lots 3, 4, 5 and 7 (each under 500*l.*) were presented by the defendants to the Commissioners of Inland Revenue for stamping. Each conveyance contained a certificate that the transaction did not form part of a larger transaction or of a series of transactions in respect of which the consideration exceeded 500*l.*

The question for the Court was whether each of the said four transactions formed part of a larger transaction or of a series of transactions.

Lawrence J. held that each sale did not form part of a larger transaction or of a series of transactions in respect of which the aggregate amount or value of the consideration exceeded 500*l.* within the meaning of the section and, therefore, that in the four cases where the consideration did not exceed 500*l.* the double tax thereby imposed was not payable.

The informant appealed.

Sir Donald Somervell A.-G. and *J. H. Stamp* for the appellant.

Laski K.C. and *A. M. Hurwitz* for the respondent.

The arguments were substantially the same as in the Court below.

SLESSER L.J. This case is, in form, a claim for a penalty under s. 5 of the Stamp Act, 1891, which provides that all the facts and circumstances affecting the liability of any instrument to duty with which any instrument is chargeable are to be fully and truly set forth in the instrument, and that every person who, with intent to defraud His Majesty, being employed in the preparation of any instrument, neglects or omits fully and truly to set forth therein all the said facts and circumstances shall incur a penalty of 10*l.* The liability is limited to cases where there is intent to defraud, but the proceedings in the present case, which are said to have been raised in order to obtain a decision of the Court upon a question of law, do not rely upon any such guilty intention, and, indeed, it is upon the basis of the absence of mens rea that the parties have concurred in stating the question of law contained in the case.

In my view, this method employed for the elucidation of the problem to be considered is seriously to be deprecated. In a case where fraud is of the essence of the complaint, where therefore precision, in that personal reputation is involved, is peculiarly necessary, a fraudulent intention on the part of the subject, which alone would justify the infliction of the penalty, has been assumed which is admitted by the Crown not to be present.

On a strict interpretation of the Statute, for absence of that fraud the case should in any event necessarily be answered in favour of the defendants. Yet it is provided that if the information be right, judgment shall be entered for the Crown for 9*l.* without penalty notwithstanding the fact that no intention to defraud is suggested. I find it difficult to understand on what principle in these circumstances liability could arise, and I think it entirely undesirable to attempt to produce the results of penal action, albeit the penalty is to be waived, when in fact no more is sought than a bare declaration.

In the circumstances, however, having made my protest, I think it right, in order that the matter may finally be disposed of, to deal with the case as it was argued, though I am by no means saying that, had I thought the Crown right in their contentions, I should not, nevertheless, for absence of fraudulent intention, have found in favour of the subject.

The material facts of the case are as follows: At a sale by auction, which had previously been advertised, certain dwelling-houses were offered for sale by the auctioneers in twelve separate lots belonging to different vendors. The defendants made separate bids during the auction for certain of the premises comprised in six lots, two of which were sold for sums in excess of 500*l.* and the four remaining lots were sold for less than 500*l.* for each lot. Six separate contracts of sale were signed on behalf of the purchasers for each separate lot, and each was separately stamped with adhesive stamps.

Nothing turns upon those lots which sold for sums in excess of 500*l.*, but as regards the remaining lots, four separate conveyances were duly executed and presented for stamping, and each of them contained a certificate in the following terms: "It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds 500*l.*"

The question raised in the case must depend upon the proper construction of the Finance (1909–1910) Act, which provides by s. 73: [His Lordship read the section and continued:] It is said by the Crown that the transaction of the purchase and conveyance of each of the lots under consideration which do not exceed 500*l.*, though it is not part of a "larger transaction," forms part of a "series of transactions" within the language of the section in respect of which the amount or value of the consideration exceeds 500*l.* The learned judge has come to the conclusion that though the parties are the same, the times of transaction close and

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the places, the subject-matter of the various conveyances, contiguous, these are casual matters which do not make it proper to say that they constitute parts of a series within the meaning of the section and that there was no evidence of any interdependence. In my view, the conclusion at which the learned judge has arrived is correct. It has to be remembered that what is required under the section is a certificate, given without intent to defraud, which must appear on the conveyance, and such a certificate, from its very nature, must state that which is, or reasonably ought to be, within the knowledge of the parties. It cannot be because some third person, looking at the matter objectively, can discover by casual coincidence some serial incident that a series of transactions inter-partes can be said to arise. I think that the preceding words relating to a "larger transaction" point to the order of series mentioned in the later limb which was in the minds of the Legislature. The mischief to be considered was that persons in reality conveying for more than 500*l.* should not evade their liability to double duty merely by breaking up that large transaction into a number of smaller transactions each of less than 500*l.*

Similarly, where co-ordinated or interdependent transactions might not be so treated as to amount strictly in law to parts of "a larger transaction," nevertheless they might be so related that, in effect, one would cause or qualify another. In such a case, where the total amount of the consideration for the series was more than 500*l.* and so might otherwise attract to itself a higher rate of duty, the series is not to escape the full rate by being dissected into artificially discrete parts. In other words, only genuine disparate transactions of less than 500*l.* are to be favoured. It is significant in this connection to note that the language used is "part of a series of transactions" and not "part of a transaction in series."

But in this case, in law, each lot was genuinely the subject of a separate contract for sale (*Emmerson* v. *Heelis* (1)); there is no evidence at all that the lots were not entirely independent. I agree with the learned judge in being unable to see that the arbitrary coincidence of time or place constituted any such interdependence as to form a series. The learned judge has found that the coincidence of the dealings was a matter of accident, and I agree with him.

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(1) (1809) 2 Taunt. 38.

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I think, therefore, that this appeal should be dismissed with costs.

ROMER L.J. In the month of September, 1934, a number of houses in Walker Road, Newcastle, belonging to a Mrs. Waller and another as trustees were, together with certain other properties belonging to different owners, offered for sale by public auction. For the purposes of the sale the houses were divided into six separate lots numbered 3 to 8 inclusive. The defendants duly bid for and became the purchasers of all the six lots for sums which in the case of lots 3, 4, 5 and 7 were under 500*l.*, though the aggregate purchase money of the four lots was considerably in excess of that sum. The sales of the four lots were completed in due course by four separate conveyances to the defendants, each conveyance containing a clause in the words following: "It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds five hundred pounds."

The object of inserting this clause in each conveyance was to bring the case within the proviso contained in s. 73 of the Finance Act, 1910. The section is in these terms: [His Lordship read the section and continued:] The question to be determined upon this appeal is whether in the circumstances of the case such a certificate as is mentioned in the section could properly be given in respect of any of the four conveyances. Before investigating those circumstances in detail, I would call attention to the fact that what has to be considered under the section is not whether the conveyance or transfer itself forms part of a larger transaction or series of transactions, but whether the transaction which is effected by the instrument can be said to do so. Now the effect of a conveyance on sale is no doubt

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to vest in the purchaser the property conveyed. But the vesting itself is not a "transaction," though the conveyance that brings about the vesting may be. The section must, therefore, be referring to the transaction that is "carried into effect" by the conveyance or transfer; that is to say, in a case like the present, the contract for sale. I propose, therefore, to examine the facts of this case with a view to ascertaining whether the contract of sale in respect of any one of the four lots in question formed part of a series of transactions within the meaning of the section. For it is not, and could not be, suggested that it formed part of a larger transaction; that is to say a larger contract of sale. That would have been the case had the defendants been taking separate conveyances of two or more properties included in the one contract. Lot 8, for instance, contained three houses and was purchased by the defendants for a sum exceeding 500*l*. Had the defendants chosen to take a separate conveyance of one of those houses, the transaction carried into effect by the conveyance, that is to say the contract to purchase that house, would have formed part of a larger transaction—namely, the contract to purchase the three houses included in lot 8.

I must now state the facts of the present case in more detail than I have done at present.

The property of Mrs. Waller and her co-trustee consisted of fourteen houses in flats in Walker Street, Newcastle, each of the two houses included in lot 3 being stated in the advertisement of the sale to contain two rooms and scullery downstairs and two rooms and scullery upstairs, and the other twelve houses being therein described as "similar" to those two. The houses were numbered 935 to 969 (odd numbers) inclusive, and 979 to 997 (odd numbers) inclusive, each house apparently possessing two numbers. Mrs. Waller and her co-trustee can therefore be properly described as having been the owners of a series of houses, unless I am greatly mistaken as to the meaning of the word "series". For the purpose of the sale the houses were, as already stated, divided into six lots numbered 3 to 8 inclusive, each of the lots 3, 4, 5 and 7 consisting of two houses and each of the lots 6 and 8 consisting of three houses. At the auction, the defendants bid for and became the purchasers of all six lots. Immediately thereafter six separate formal contracts of sale in respect of the said six separate lots were signed by or on behalf of the defendants, and all six contracts were, mutatis mutandis, in the same form. In my opinion the contracts can be accurately described as a series of contracts. They were entered into as the result of a series of houses belonging to the same vendors having been offered for sale at one and the same auction in a series of lots all of which were then and there bought by the same purchasers.

It was contended on behalf of the respondents, and the contention found favour with the learned judge, that there cannot be a series of transactions within the meaning of the section unless there be some interdependence between them. The contention is stated in the judgment of the learned judge in these words: "Mr. Laski, on behalf of the defendants, contends that 'series' cannot be read in that wide sense, and that there must be, in the sort of series that are referred to in that section, some interdependence between the individual transactions which form the series. He has referred me to a number of cases which show that the buying of lots at auction constitutes separate contracts, and they only relate to each other so as to be in equity one contract where there are circumstances known to both parties at the time of the auction which show that the bids of the purchaser were dependent upon his obtaining a good title to the other lots."

He then refers to some of the authorities that Mr. Laski had cited, which included *Emmerson* v. *Heelis* (1) and *Holliday* v. *Lockwood*. (2) But though these authorities undoubtedly show that there must be some interdependence between two or more contracts before they can be treated as one, they do not, with great respect to the learned judge, have any bearing upon the present question. As I have already pointed out, no one has suggested that the contracts in the present case or any two or more of them constitute one contract. The question is whether they constitute a series of contracts, and upon that question those authorities throw no light. Take, for example, the case of *Emmerson* v. *Heelis*. (1) It was held that the contracts for the purchase of several lots of turnips at an auction did not form one contract. Had the question been whether they formed a series of contracts, the answer should, in my opinion, have been in the affirmative.

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(1) 2 Taunt. 38.

(2) [1917] 2 Ch. 47.

But, as I understand the argument of the respondents, they do not contend that the contracts in the present case do not form a " series " in the ordinary acceptation of that word, but that the Legislature must have intended to use the word in some more restricted sense as connoting an interdependence between a number of transactions, yet one not sufficiently pronounced to constitute them one transaction within the meaning of the authorities that were cited. If this were the intention of the Legislature, I can only regret that it did not give some intimation of the kind of transactions that it had in mind. For myself I am unable to think of any that would constitute a series within this restricted meaning. But what reason is there to suppose that the Legislature did not use the word in the sense in which it is ordinarily used ? I can see none. It is plain that if the eight houses included in lots 3, 4, 5 and 7 had been included in one lot, or even in two lots, as they might well have been, the defendants would have been obliged to pay the increased stamp duty imposed by s. 73 even if they had taken separate conveyances of the houses included in each of those lots. It is equally clear that had all the eight houses, though bought by four separate contracts, been included in one conveyance, as might well have happened, the considerations being aggregated for this purpose into one sum, the stamp duty on the conveyance would have been at the increased rate. I cannot understand why, in the circumstances, it should be thought that the Legislature did not intend the increased stamp duty to be paid merely because the defendants chose to take four separate conveyances. I should have expected its intention to be precisely the contrary. I can see no reason whatsoever for supposing that it intended to use the word " series " in a sense that would relieve the purchaser in the present case from the increased duty. That cases may arise in which it will be difficult to say whether or not the conveyance or transfer carries into effect a transaction that forms part of a series of transactions, as I construe the word "series," no one will deny. But that, one would think, must be the case whatever construction be placed upon the word "series." In any case the fact that such difficulties may, and perhaps must, arise is no reason for not attributing to the word "series" its ordinary meaning. If given that meaning, I am of opinion that it covers the case with which we are now concerned.

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(1) 2 Taunt. 38.

In my opinion the appeal should be allowed.

Although, to my regret, I find myself in disagreement with the other members of the Court upon this question, I desire to express my entire concurrence in what Slesser L.J. has said as to the form of procedure adopted in this case.

GREENE L.J. The question raised by this appeal arises under s. 73 of the Finance (1909–1910) Act, 1910, and is stated in the special case to be "whether each of the transactions effected by the four conveyances aforesaid formed part of a larger transaction or series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds 500*l.*" The facts of the case have already been sufficiently stated, but I shall have something to say at the conclusion of my judgment as to the manner in which the question is brought before the Court.

Sect. 73 of the Finance (1909–1910) Act, 1910, provides in its opening words that "The stamp duties chargeable under the heading 'CONVEYANCE OR TRANSFER on Sale of any Property' in the First Schedule to the Stamp Act, 1891, ... shall be double those specified in that Schedule." By s. 54 of the Stamp Act, 1891, the expression "conveyance on sale" includes "every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction." Sect. 6 of the

Finance Act, 1898, declares that the definition of a " conveyance on sale " in s. 54 of the Stamp Act, 1891, includes a decree or order for, or having the effect of an order for, foreclosure. Sect. 74 of the Finance (1909–1910) Act, 1910, provides that conveyances operating as voluntary dispositions inter vivos shall be chargeable with stamp duty as if they were conveyances on sale with the substitution of the value of the property for the amount of the consideration.

The documents, therefore, which are to be charged with double duty are documents effecting a variety of transactions, and this circumstance in my opinion explains the use of the general term " transaction " in the proviso to s. 73 of the Act of 1910 to which I now turn. [His Lordship read the proviso and continued :] In my opinion the " transaction effected " by the documents now in question was in each case the conveyance of the property comprised therein to the purchaser. I do not take the view that the transaction effected is the antecedent contract. Each of the transactions effected by the four conveyances was a separate and independent transaction unconnected with the others. Each of them carried out a separate and independent contract unconnected with the contract carried out by the others. There was no relationship between the transactions effected by the conveyances except that the houses were all situate in the same street, the parties were the same, the conveyances all bore the same date and the contracts which they carried out were all made on the same day and at the same place. The question which arises in this case is whether the mere existence of this relationship is sufficient to constitute each of these separate and independent transactions " part of a series of transactions " within the meaning of the section since it was not and could not be contended that they formed part of a larger transaction. The learned judge held that the transactions did not form part of a series of transactions, and I agree with him.

In approaching the construction of the relevant words of the section, there are, in my opinion, three matters which it is important to bear in mind. The first is that it is the presence of the certificate in the conveyance which by the section gives rise to the exemption from double duty. In so far as it is open to the Crown by some appropriate method to challenge the propriety of a certificate it is, I think, proper to apply the rule that a tax is not to be imposed except by clear language. In my judgment, if the Legislature had intended that a relationship such as that which exists in the present case between separate and independent transactions should constitute each transaction part of a series, it should have said so in clear terms, for example, by using some such words as " one of a number of substantially contemporaneous transactions ".

The second matter is that once the facts are ascertained the question whether they fall within the language used in the section is a question of the construction of the section, and therefore a question of law see *Farmer* v. *Cotton's Trustees* (1), per Lord Parker): It is, therefore, in my judgment, illegitimate to treat the question as a question of fact or, as it is sometimes put, a question of degree, which is the same thing expressed in a different way. The statement that a transaction forms part of a series involves a tacit finding as to the meaning of the word " series " in its context, and for my part I am unable to take so easy a path in order to arrive at a solution of the present difficulty. It is, in my judgment, incumbent upon those who assert that a number of transactions constitute a series within the meaning of the section at least to point to some quality in them which upon some intelligible ground removes them from the category of separate transactions and unites them under the head of a series. In the arguments addressed to us on behalf of the Crown, I have been unable to discover any such intelligible ground, since the elements which it was suggested will convert what is not a series into a series, appear to me to be quite fortuitous and incapable of being referred to any intelligible ground of differentiation.

The last matter is this. The proviso leaves it to the parties to determine and certify whether or not the transaction forms part of a series of transactions. Presumably, therefore,

(1) [1915] A. C. 922, 932.

the Legislature thought that the question whether or not a certificate could properly be given would be readily determined and would not require a consideration of the exact weight to be given to a number of matters of fact, a question upon which different views might well be taken. The certificate is to be the certificate of both parties to the transaction,—or, it may be, of a number of parties, and it can scarcely be supposed that the Legislature intended to confront them with nice questions upon which there might well be acute differences of opinion. Yet the refinements by reference to which, according to the Crown's contention, the question would fall to be decided, will inevitably lead to such a result.

I now turn to a consideration of the crucial words of the section. The word "series" must be read in its context, which is "part of a larger transaction or of a series of transactions." The expression "part of a series" suggests, to my mind, that by a series is meant something of which it can be said there is some integral relationship between its parts. It does not, I think, convey the idea that all that is required is that the transaction should be one of a number of transactions related to one another in time or space or both. This view is, I think, strengthened by the fact that the expression "part of a series of transactions" stands in juxtaposition to the expression "part of a larger transaction". Many instances can be thought of where it might be doubtful whether a transaction could properly be described as "part of a larger transaction" but where by reason of the presence of an integral relationship with other transactions it could be said to form "part of a series of transactions". And here it is of importance to remember that the class of transactions effected by documents covered by the section is a varied one. Thus it covers the case where in one action (or under one reference) by successive orders of the Court (or of Commissioners) different parts of a property become vested in a purchaser. Again, a builder developing a building estate might have under one contract an option to purchase different plots at different times, so that each option, when exercised, would create a separate contract. In each of these cases it would at the least be a matter of doubt whether a particular order or conveyance could be said to form part of a larger transaction, but there would, I think, be in each case such an integral relationship between the transactions as to constitute each indubitably part of a series of transactions. In my opinion, read in its context, the phrase " part of a series of transactions " is intended to sweep in cases where the relationship between the transactions is an integral and not a fortuitous one depending merely on such circumstances as contiguity in time or place, but is such that it would not or might not be sufficient to bring them within the phrase, " part of a larger transaction ".

Apart from the fact that in order to constitute a series the vendor and the purchaser must in each transaction be the same, the Crown's argument requires no relationship between the various transactions except one which is to be built up by means of a number of matters of fact. Thus in the present case the facts that the houses were all of the same type, that they were all situated in the same street, that they were sold at the same auction sale on the same day, were all added together in order to make the required " series ". But what if they had been of different types, or in different streets, or had been sold on two successive days, or on the same day in two different auction rooms? And what if contracts made on different days were all carried out by conveyances made on the same day? It is, in my judgment, no answer to the criticism involved in these questions to say that it is the combination of facts which constitute the transactions a series, since this statement tacitly involves an answer to the question, " What is a series? " and begs the question of construction. Indeed, my criticism of the Crown's contention is that it shirks the difficulty. Mr. Stamp contended that mere contiguity in time would convert into a series something which would not otherwise be a series. I cannot myself accept the view that the question falls to be determined by such nice considerations. In the course of the argument I put to the Attorney-General the question whether, if a mortgagee of four separate properties under four

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separate mortgages began four separate foreclosure actions on the same day and obtained four separate foreclosure decrees on the same day, these decrees would each form part of a series of transactions. His reply was that it would depend on such matters in the history of the mortgages as whether or not they were executed on the same day and whether or not the mortgagor had been in the habit of paying the interest by one cheque. Indeed, whenever the Crown's contention was closely examined it did not appear, to my mind at any rate, to provide any satisfactory principle for distinguishing what is from what is not a series in this taxing Statute.

The question is, no doubt, one of difficulty, but on the whole, giving the matter the best consideration that I can, I have come to the conclusion that the appeal should be dismissed.

Before concluding this judgment, I wish to say a word as to the manner in which the question has been raised before the Court. The proceedings take the form of a claim by the Attorney-General on behalf of His Majesty for a penalty under s. 5 of the Stamp Act, 1891. It was not explained to us how, in the absence of the intent to defraud the Crown which that section requires, a penalty could be recovered—it certainly cannot be suggested in the present case that there was any intent to defraud. But it is said (whether rightly or wrongly) that proceedings under s. 5 afford the only means of having the substantial question determined, and that the respondent has agreed to have it determined in this way. Speaking for myself, I do not think that the Court should be asked to adjudicate on a matter which is raised before it upon an assumption of fact which is not true, particularly when that assumption is based on an agreement between the Crown and a subject by which the subject is to be treated as having committed a criminal offence of which he is quite clearly not guilty.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Gale & Phelps, for Sebag Cohen & Co., Sunderland.*

J. L. D.

THE KING *v.* CORNWALL COUNTY VALUATION COMMITTEE AND OTHERS.

1936
Dec. 8.

Ex parte FALMOUTH RATING AUTHORITY.

SAME *v.* SAME. *Ex parte* SAME.

Rating—County rating—Valuation—Proposal by county valuation committee for increase—Right to proceed in parts of county successively—Uniformity of assessment—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 18, *sub-s.* 2; *s.* 37, *sub-s.* 1.

The Rating and Valuation Act, 1925, provides :—

Sect. 18: " (1.) For the purposes of this Part [Pt. II.] of this Act there shall be established in every county a committee of the county council (to be called ' the county valuation committee ') . . . .

" (2.) It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this Part of this Act, ... "

Sect. 37: " (1.) Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force . . . . may make in manner provided by this section a proposal for the amendment of the list . . . . " :—

Held, that on the true construction of these provisions the county valuation committee in carrying out the duty imposed upon it by s. 18, sub-s. 2, of promoting uniformity of valuation in the county was not bound to make proposals for the correct valuation of all the hereditaments in the county at the same time, but might proceed by instalments and make proposals for the correct valuation of the hereditaments or some of them in parts of the county in succession ; and consequently :—

Where in several areas of a county the prevailing valuations were too low, and the county valuation committee made a proposal for the correct valuation of a hereditament in one of the areas only, and the assessment committee determined that proposal and made an order increasing the gross and rateable value of that hereditament accordingly :—

Held, that the rating authority for that area was not entitled to obtain either a writ of certiorari to quash the order of the assessment committee, or a writ of prohibition to prevent the county valuation committee from making or the assessment committee from determining and enforcing any other such proposal, on the ground that any such proposal made by the county valuation committee in regard to part only of the county must be made in disregard of its statutory duty to promote uniformity of valuation in the county.

Double v. *Southampton Assessment Committee* [1922] 2 K. B. 213, held inapplicable.

TWO ORDERS NISI, the one for a writ of certiorari and the other for a writ of prohibition.

The second quinquennial valuation list for the rating area of the borough of Falmouth, in the county of Cornwall, came into force on April 1, 1934, and the third list would come into force on April 1, 1939.

On January 28, 1935, the county valuation committee of the Cornwall County Council passed a resolution approving the report of a sub-committee stating that in ten rating areas in the county many valuations appeared to be too low, and expressing the opinion that in order to obtain more uniformity of valuation it was essential that the work of increasing these valuations should be done as soon as possible.

In April, 1936, the county valuation committee made proposals to amend the valuation list for the rating area of Falmouth in respect of the assessment of 3795 hereditaments therein consisting of houses and shops and representing 83 per cent. of those classes of property in Falmouth.

In June, 1936, the West Cornwall assessment committee determined, in respect of 118 of these hereditaments, proposals by which the county valuation committee sought to raise the total gross values by 73 per cent.; and in June and July, 1936, the assessment committee further determined proposals in respect of 210 more of these hereditaments, including a hereditament in the occupation of Mr. W. Manuell, the gross value of which was increased from 28*l.* to 48*l.*

No appeal from the decision of the assessment committee in respect of that last mentioned hereditament had been made to quarter sessions.

The county valuation committee had made no proposals for the amendment of the valuation lists for any of the other rating areas in the county pursuant to their resolution of January 28, 1935.

If the valuation list for the rating area of Falmouth was

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amended as proposed by the county valuation committee, the total rateable value of the 3795 hereditaments would be increased from 75,155*l.* to 118,574*l.*, an increase of 43,419*l.*, and that increase would take effect as from April 1, 1936. The half-yearly rate for county expenses was 3*s.* 4½*d.*, so that if these proposals were adopted the occupiers of those hereditaments would have to contribute an additional 7327*l.* towards county expenses during the half-year.

On July 20, 1936, the Falmouth Corporation, being the rating authority for that borough, made an application to the High Court for an order nisi calling upon the West Cornwall assessment committee to show cause why a writ of certiorari should not issue to remove into the High Court the decision made by that committee on the proposal of the county valuation committee to increase the assessment of the hereditament occupied by W. Manuell as above mentioned on the grounds: (1.) that the county valuation committee in proposing increases in assessments of any dwelling-houses or shops in a part only of the county of Cornwall was contravening its statutory duty to promote uniformity in the principles and practice of valuation and was taking steps calculated to produce the opposite effect; (2.) that the assessment committee if it gave any effect to the said proposals of the county valuation committee would be imposing an unfair and unequal burden upon ratepayers in the borough of Falmouth in respect of county expenses.

On the same date the Falmouth Corporation as such rating authority made an application to the said Court for an order nisi calling upon the said county valuation committee and the said assessment committee to show cause why a writ of prohibition should not be awarded to prohibit the county valuation committee from proceeding with, and the assessment committee from hearing or determining, any proposal by the county valuation committee for increases in assessments of any dwelling-houses or shops in the borough of Falmouth until the county valuation committee lodged and proceeded with similar proposals taking effect in the same half-year in relation to all similar hereditaments in the county which in the opinion of the county valuation committee were under-assessed, on the same grounds on which the order nisi for a certiorari had been obtained.

These applications were supported by an affidavit made by Mr. Ivor J. W. Corlyon, the borough treasurer and rating officer for Falmouth, in which he stated the above-mentioned facts, and further alleged (inter alia) that if the county valuation committee took steps to re-assess all rating areas in Cornwall with effect from April 1, 1936, there would be no discrimination against Falmouth and Falmouth would not be liable for more than its fair share of county expenses; that resolutions and letters of the county valuation committee exhibited to the affidavit showed that it was the intention of that committee to spread the process of re-assessment over a period of at least three years and unless and until that process was completed the ratepayers of Falmouth would continue to pay an undue proportion of county expenses as compared with ratepayers in other parts of the county; that the Falmouth rating authority had been advised and believed that the effect of the action of the county valuation committee in requiring the re-assessment of Falmouth without at the same time requiring the re-assessment of the other rating areas in the county of Cornwall which had been assessed on the same basis as Falmouth, and the action of the West Cornwall assessment committee in making a re-assessment by amending the Falmouth valuation list, was to make that list unfair and bad in law and that such proposals were themselves bad in law; and that unless the county valuation committee could be prevented from pursuing the course which they had indicated, the Falmouth rating authority would be compelled in defence of the ratepayers in their area to serve and proceed with proposals to make similar increases in the assessments in every other rating area in the county.

The applications were also supported by an affidavit made by Sir H. Trustram Eve, a fellow of the Chartered Surveyors' Institute, and a past president of the Rating Surveyors' Association, in which he said (inter alia) that he had appeared for the Falmouth rating authority when the West Cornwall assessment committee heard and determined the batch of 118 proposals made by the county valuation committee, and gave the evidence and advanced the contentions to that committee which in his affidavit thereafter appeared; that before appearing before the assessment committee he had ascertained that the method of valuation adopted by the county valuer was to apply a basic price to the "reduced covered area" of each hereditament, the reduced covered area of a two-storey house being ascertained by measuring the area covered by the building and multiplying by two, and that that method of valuation was used in many parts of the country for the valuation of the class of property the subject of the proposals in question; that he had also investigated the standard of valuation adopted by rating authorities and assessment committees as shown in the second valuation list for the rating areas of Falmouth and nine other boroughs in West Cornwall; that the standard of valuation in Falmouth was no lower than in these other rating areas and that there was uniformity of valuation throughout these areas; that the county valuation committee had decided that it was "preferable administratively" to revalue the county area by area spread over a number of years, and that they were therefore abrogating their statutory duty to promote uniformity for reasons of administrative convenience; that they took no steps during the preparation of the second valuation list to have that new basis of valuation adopted throughout the county; that if they wanted to raise the standard of valuation they should by conferences with rating authorities and assessment committees arrange for the adoption of that new standard of valuation during the preparation of the third valuation list which all rating authorities would have to begin in 1937 in order to bring the new lists into force on the statutory date April 1, 1939; that, alternatively, if the county valuation committee did not wish to achieve a new standard of valuation by the methods suggested in s. 18, sub-s. 2, of the Rating and Valuation Act, 1925, and insisted on doing the work of revaluation which should be done by rating authorities, they should make proposals throughout the county during the same rate period so that the revaluation would take effect everywhere as from the same date; that there was no practical difficulty in revaluing a whole county at one time, and that in his (deponent's) experience it was cheaper to do so than to use a small staff and spread the process of revaluation over a series of years; and that, if the plans of the county valuation committee were not modified, the extra and unfair burden which would be placed on Falmouth would make it necessary for the Falmouth rating authority to ensure that the new level of assessment was applied in all the other areas at the same time as in Falmouth, which would be a more onerous task than should be forced on any rating authority.

The High Court made the orders nisi applied for.

On December 8, 1936, the orders nisi came before the High Court for argument.

On the argument of the orders nisi an affidavit of Mr. N. Gasson, county valuer to the county valuation committee, was read on behalf of that committee, in which he stated that during the past nine years he had on the instruction of that committee constantly drawn the attention of the assessment committees and rating authorities in the county to the need of making correct and uniform assessments in accordance with law, and to the fact that correctness and uniformity could only be obtained if these authorities applied justly to each and every hereditament in their areas the definition of gross value or net annual value set out in the Act of 1925; that he contended before the assessment committee that that committee were not concerned with the present or future policy of the county valuation committee, but only with the correctness or otherwise of the assessments before them, and that their duty was to determine the correct gross value or net annual value of each individual hereditament in accordance with law.

An affidavit of Mr. Thomas A. H. Sheers, the clerk of the Cornwall County Council, was also read on behalf of the same parties, in which he stated that on October 30, 1931, on the instructions of the county valuation committee he had sent a circular to the five assessment committees in the county and through them to the rating authorities asking them to apply in practice justly and carefully the statutory definitions of gross value and net annual value; that on October 25, 1932, on the instructions of the said committee he had sent a circular letter to the assessment committees and the rating authorities in the county informing them that uniformity should be obtained by correcting inaccuracies rather than making inaccurate assessments; and that the county valuation committee had sought and was seeking to promote uniformity of assessment in the county by taking steps to make existing assessments conform to the standards provided for by the statutory definitions of gross value and net annual value in cases in which existing assessments did not conform to these standards.

Michael Rowe, for the West Cornwall assessment committee, showed cause. The function of the assessment committee was purely judicial, and they would prefer to take no active part in the argument of these orders nisi. The parties really interested in opposing the orders nisi are the county valuation committee, and the burden of showing cause would most properly be assumed by them.

F. J. Tucker K.C. and *G. D. Squibb*, for the Cornwall county valuation committee, showed cause. The Falmouth rating authority, the applicants, are not entitled either to a writ of certiorari to quash the decision of the assessment committee to increase the assessment of the hereditament in question, or to a writ of prohibition to prevent the county valuation committee from proceeding with, and the assessment committee from determining, any proposal by the county valuation committee for increases in assessments of any hereditaments in Falmouth until the county valuation committee proceed with similar proposals in relation to all similar hereditaments in the county which are under-assessed, on either of the grounds relied upon. The Rating and Valuation Act, 1925 (1), provides by s. 18 sub-s. 1, that there shall be established in every county a county valuation committee, and by s. 18, sub-s. 2, that it shall be the duty of every county valuation committee to take such steps as it thinks fit for promoting uniformity in the principles and practice of valuation; and by s. 37, sub-s. 1, that any person, including the county valuation committee, who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force may make in manner provided by that section a proposal for the amendment of the list. The object of the Cornwall county valuation committee, as appears from the evidence given on its behalf, was to promote uniformity of valuation in the county by drawing attention to the need of applying to every hereditament in the county the statutory definition of gross value or net annual value. The county valuation committee have come to the conclusion that the whole of the rating areas of the county of Cornwall have for some time past suffered from not only inaccurate but unequal assessment, and that there is a great deal of under-assessment especially in Falmouth rating area, and there can be little doubt that these views are well founded. In exercise of their statutory duty to promote uniformity of valuation they decided to endeavour to remedy that inequality in the most convenient, and indeed the only practicable way—namely, by making proposals for altering the assessment of the hereditaments, not in all the areas of the county simultaneously, but in the areas successively—and they have begun by making a proposal for increasing the assessment of premises in Falmouth. In taking that course the county valuation committee are not disregarding their statutory duty. The Act does not oblige that body to make proposals for uniformity of valuation in all parts of the county at the same time, or prevent them from making proposals as to the parts successively, so long as the proposals are directed to attaining uniformity in a reasonable time, and the statements to the contrary in the affidavits filed in support of the present applications are not well founded. The assessment committee by giving effect to the proposal in regard to Falmouth did not impose an unequal burden upon that area in the matter of county expenses. The statement in the affidavit of Sir H. Trustram Eve that there appeared to be a uniform level of assessment in the county which would be disturbed by raising the assessment of Falmouth lacks corroboration. The county valuation committee is entitled under the Act of 1925 to make proposals for altering the valuation of any hereditaments in any area of the county, and the assessment committee has jurisdiction to make orders giving effect to these proposals, even though other hereditaments in the area or in the county may remain assessed at a lower rate : *Lilley & Skinner, Ld.* v. *Essex County Valuation Committee* (1) ; *Rex* v. *South Eastern Essex Assessment Committee. Ex parte Patterson* (2) ; and *Ladies Hosiery and Underwear, Ld.* v. *West Middlesex Assessment Committee.* (3) The cases of *Double* v. *Southampton Assessment Committee* (4) ; *Stirk & Sons* v. *Halifax Assessment Committee* (5) ; *Hunter* v. *Swindon and Highworth Union Assessment Committee* (6), in which it was held that an alteration in the valuation of certain hereditaments only in an area rendered the valuation list and a rate made thereon unequal and unfair, are inapplicable to the present case, inasmuch as these cases were decided before the passing of the Act of 1925 when the county valuation committee and the powers with which it is vested did not yet exist. The present proceedings are misconceived. The object of them appears to be to prevent the county valuation committee from making proposals in regard to the valuation of any area in the county. If the Falmouth rating authority objected to the assessment of any hereditaments in the area, they should have appealed to quarter sessions against the rate or taken proceedings in the High Court to quash the rate or the valuation list.

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(1) The material provisions of the Act are set out in the headnote and in the judgment of the Lord Chief Justice.

Comyns Carr K.C., *J. Scott Henderson*, and *R. Stock* for the Falmouth Borough Council, the rating authority, in support of the orders nisi. The Cornwall county valuation committee

(1) (1935) 153 L. T. 64.
(2) (1935) 153 L. T. 152.
(3) (1931) 16 Rating and Insurance Tax Reports 116—K. B. ; [1932] 2 K. B. 679—C. A.
(4) [1922] 2 K. B. 213.
(5) [1922] 1 K. B. 264.
(6) [1922] 2 K. B. 630.

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was not entitled to make a proposal for an increase in the assessment of hereditaments in part only of the county, nor was the assessment committee entitled to pronounce a decision on that proposal, and a writ of certiorari should issue to quash that decision and a writ of prohibition should issue to prohibit the county valuation committee from proceeding with and the assessment committee from determining any proposal by the county valuation committee for an increase in the valuation of premises in a part only of the county. As has been pointed out, the Rating and Valuation Act, 1925, by s. 18 created the county valuation committee and imposed upon it the duty of promoting uniformity in valuation in the county, and by ss. 26 and 37 shows the kinds of incorrectness or unfairness in valuation which render the promotion of uniformity in valuation necessary. The county valuation committee have made a proposal which has been rendered effective by the assessment committee for increasing the valuation of certain hereditaments in Falmouth, and they admit that at present in many parts of the county other than Falmouth the hereditaments are undervalued, and in some of them much undervalued. The rating authority do not admit that the valuation of the particular hereditament in question, or of the class of hereditaments in which it was included, is correct; but, even if it is correct, it does not follow that the county valuation committee have discharged their statutory duty of promoting uniformity of valuation in the county. To correct the valuation of one or some of the hereditaments in an area does not make the valuation in the area uniform unless the other hereditaments in the area are correctly valued also; neither does the correction of the valuation in one area of a county make the valuation in the county uniform unless the other areas are correctly valued also. On the contrary the correct valuation of one area only may destroy uniformity of valuation in the county, and render that area liable for an unduly large share of the county expenses. The principle to be kept in view in all cases is that of uniformity of valuation. Where in a given rating area a particular hereditament is correctly valued but other hereditaments are valued at a proportionately lower figure, the owner of that hereditament has a grievance and steps may be taken by himself or otherwise to increase the valuation of the other hereditaments or to quash the valuation list or any rate made upon it: *Double* v. *Southampton Assessment Committee* (1) and *Ladies Hosiery and Underwear, Ld.* v. *West Middlesex Assessment Committee.* (2) This case, however, does not relate only to inequality of valuation within a given rating area, but to inequality as between different areas, and the remedies available to an individual occupier would not be available to the rating authority. Several remedies have been proposed to the rating authority as alternatives to that which they are here adopting. One suggestion was that the rating authority should serve, or support a proposal for serving, upon the occupier of every hereditament in the county a notice of the proposed alteration in valuation. This course could no doubt be taken, but one result of it would be that the rating authority would have to appear frequently before the assessment committees to answer objections to the proposed alteration in valuation, and would thus incur much trouble and expense. Another suggestion was that the rating authority should apply to the High Court for orders nisi to quash the various valuation lists or the rates made thereon; but it has never yet been decided, under the Act of 1925, whether the application should be to quash the valuation list or the rate, and if the rating authority should take the wrong course it would incur heavy costs to no purpose. None of the alternative remedies which have been suggested would, on the whole, be so convenient for the rating authority as that which has here been adopted by that body—namely, the present application for writs of certiorari and of prohibition. Sir H. Trustram Eve has stated in his affidavit in support of this application that there is no practical difficulty in revaluing a whole county at one time, and that it is cheaper to do so than to spread the process over a series of years; and these statements are not contradicted by the county

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(1) [1922] 2 K. B. 213.

(2) 16 Rating and Insurance Tax Reports 116—K. B.; [1932] 2 K. B. 679—C. A.

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valuation committee or by the assessment committee. The Act of 1925 requires that the whole of England be revalued at the same time once every five years; and if the whole country can be valued at the same time, so also can a single county. On the undisputed evidence for the applicants it is both more practicable and cheaper to value the whole county at once than to do so piecemeal. Sect. 18 of the Act of 1925, which creates the county valuation committee, imposes upon that body the positive duty to promote uniformity in the principles and practice of valuation, and does not require it to adopt methods which are not conducible to that end. The remedy which ought properly to have been adopted with a view to the promoting of uniformity of valuation in the county was an application to the High Court by the county valuation committee for an order to quash all the valuation lists in the county.

LORD HEWART C.J. These are two orders nisi, the one for a writ of certiorari, and the other for a writ of prohibition. The applicants in each case in fact, though not in form, are attacking what has been done by or in consequence of the action of the county valuation committee of the Cornwall County Council.

To take first the order nisi for certiorari, it is sought by means of that prerogative writ to quash a certain decision made by the assessment committee for the West Cornwall assessment area upon a proposal of the county valuation committee of the Cornwall County Council. That was a decision given on June 30 last to increase the assessment of a particular hereditament from 28*l.* to 48*l.* gross. The grounds upon which the order nisi were sought and obtained were two, first that the valuation committee in proposing increases in assessments of any dwelling-houses or shops in a part only of the county of Cornwall " is contravening its statutory duty to promote uniformity in the principles and practice of valuation and is taking steps calculated to produce the opposite effect " ; and secondly, that " the said assessment committee will be imposing an unfair and unequal burden upon ratepayers in the borough of Falmouth in respect of county expenses." It is to be observed at the beginning that no allegation was made to the effect that the increase in the assessment of the particular hereditament which is referred to from the gross value of 28*l.* to the gross value of 48*l.* is in itself incorrect. On the contrary it is admitted that, according to the proper statutory definition of "gross value," the figure to which the assessment by the decision objected to is increased is right. The argument is that because the application of the principle or basis whereby that particular assessment is corrected and increased is not simultaneously made applicable to each and every part of the county of Cornwall therefore the assessment and the proposals of the valuation committee must be wrong.

It is important, therefore, to observe what the duties of the county valuation committee are. The entity was unknown before the passing of the Rating and Valuation Act, 1925. By s. 18 of that Act it was provided that for the purposes of a particular part of the Act there shall be established in every county a committee of the county council consisting of a certain number of persons according to the decision of the county council and a representative of the assessment committee for each assessment area comprised in the county. By sub-s. 2 of that section it is provided as follows: "It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this Part of this Act, and for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties, to hold conferences with persons representing assessment committees (including assessment committees for county boroughs), and to bring to the notice of any rating authorities or assessment committees any conclusions arrived at or recommendations made by the committee or at any such conference." There in the clearest possible terms are set out the fundamental objects and purposes of the county valuation committees. Then sub-s. 3 goes on, subject to the proviso, to enact that "A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee, or other county valuation committee, appear as a party to any objection or appeal under this Part of this Act."

That being the law prescribing the duties of the county valuation committee, what is it that has been done here? The basis of the order nisi for certiorari as it is also the basis of the order nisi for prohibition is an allegation that jurisdiction has been exceeded or usurped—in the case of certiorari that it has been exceeded, in the case of prohibition that a course of conduct is being taken or is threatened which will lead to an excess of jurisdiction. It is important, therefore, to see wherein it is alleged that this county valuation committee has usurped or exceeded jurisdiction. In surveying the field of assessments in the county of Cornwall it observed that to a considerable extent at any rate prevailing assessments were too low. There was not a uniform degree of inaccuracy in the sense that all assessments were too low, for some were lower than others. Faced with that prevailing fact the county valuation committee set itself to correct the error and entered upon a course which appeared to it, in the phrase much employed by Mr. Comyns Carr, conducive to the uniformity which by s. 18 of the Act it is the function of the valuation committee to promote. But it appeared to the committee, who had it in their power to take such steps as they thought fit for promoting uniformity, that the businesslike and desirable course was to proceed by instalments or by steps and not to refuse half a loaf if they could not at the moment get the whole loaf. Proceeding therefore by instalments with the intention of ultimately dealing with the whole field of inaccuracy, the county committee made certain proposals, and in particular proposals affecting the assessments in the borough of Falmouth, and it is the rating authority of that borough which complains of what was done.

The argument on behalf of the rating authority reduced to its simplest form is that it is wrong to attempt to correct the part if it is not possible at one and the same moment to correct the whole; otherwise it is said an inequality is produced in that some assessments are made correct and thereby are deprived of having the advantage enjoyed by others of remaining incorrect. I know of no authority either in the Act or in any reported decision which lends colour to that remarkable theory. There is nothing either in the case of *Double* v. *Southampton Assessment Committee* (1), to which a good deal of reference has been made, or elsewhere to show or to suggest that the county valuation committee, a body which did not exist at the time of *Double* v. *Southampton Assessment Committee* (1), is exceeding its powers when it proceeds piecemeal to the work of revision and revaluation. There has been in fact a series of cases, some of which have been referred to in the course of the argument, which show that it is idle for a person who has been correctly assessed to complain that he does not enjoy the incorrectness which is the basis of his neighbour's assessment. There is plenty of authority in support of that proposition. It is to be observed that the county valuation committee is not levying a rate or determining a series of assessments. It is merely putting forward proposals, holding conferences and bringing material facts to the notice of rating authorities and assessment committees. Its work is essentially preliminary. I cannot see the smallest foundation for the contention that in what it has done here this particular county valuation committee has in any degree exceeded its authority.

With regard to the order nisi for certiorari, it is worth noting that the stated object of the writ if granted is to put an end to a particular decision of an assessment committee whereby the assessment of a named hereditament was admittedly raised from an incorrect to a correct value. That object as a basis for the writ seems to me to be fundamentally unstable. It is quite true that the grounds upon which the order nisi is sought are general grounds of the nature which I have already described, but such grounds must allege that

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(1) [1922] 2 K. B. 213.

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the valuation committee has done something which it is not entitled to do.

In like manner in the case of the order nisi for a writ of prohibition it is sought that that writ should be directed to the county valuation committee itself to prohibit it from proceeding with and to prevent the assessment committee from hearing or determining any proposal of the committee for similar increases until the valuation committee "lodges and proceeds with similar proposals taking effect in the same half-year in relation to all similar hereditaments in the county of Cornwall which"—and then comes the remarkable phrase—"in the opinion of the said county valuation committee are under-assessed." In other words, the valuation committee is to determine what is the total catalogue of hereditaments in the county which in the opinion of that committee are under-assessed and thereupon can make suggestions or proposals in relation to one or more of those assessments only upon the terms that simultaneously on the same footing proposals are made with reference to all the rest.

I find it impossible, as I have said, to discover either in the statute or in any reported case any authority whatever for the proposition that what has been done and what is being done here by this valuation committee amounts to an excess or usurpation of jurisdiction. On the contrary it appears to me to be manifest that by well considered steps and appropriate instalments the valuation committee is proceeding to the accomplishment of its task of promoting uniformity in the principles and practice of valuation in the large area with which it is concerned.

For those reasons I think that each of these orders nisi ought to be discharged.

SWIFT J. I agree, and I have nothing to add.

MACNAGHTEN J. I also agree.

Orders nisi discharged.

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Solicitors for West Cornwall assessment committee: *Hatchett Jones & Co., for J. Antron Thomas, Helston.*

Solicitors for the Cornwall county valuation committee: *Speechly, Mumford & Craig, for the Solicitor for County of Cornwall, Truro.*

Solicitors for Falmouth Corporation and Rating Authority: *Sharpe, Pritchard & Co., for the Solicitor for Falmouth Corporation.*

J. R.

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UNION TRANSPORT FINANCE, LIMITED *v.* BALLARDIE.

Sale of goods—Sale to plaintiff company—Goods let on hire by plaintiff company under hire-purchase agreement to impecunious employee of seller—Colourable transaction—Retention of goods by seller—Subsequent delivery by seller to defendant under hire-purchase agreement—Receipt of goods by defendant in good faith and without notice of previous sale—Title of defendant—Factors Act, 1889 (52 *&* 53 *Vict. c.* 45), *s.* 8.

On May 17, 1935, T., a branch manager of the plaintiff company, bought for and on behalf of the company from C. a motor-car which was forthwith let on hire under a hire-purchase agreement to F., an employee of C., who was not in a financial position to buy a car on any terms. C., T. and F. all knew that the hire-purchase transaction was not genuine in the sense that it was never intended that F.'s part in it should be a real one or that the car should be delivered to F., either by its physical transfer to his custody or by C. submitting to hold it as his bailee. C. made such payments to the plaintiff company as were made under the agreement between the company and F., and, although F. had agreed not to change the permanent garage of the vehicle, which was expressed to be at his mother's residence, nor to part with its possession or control, and had signed a document acknowledging that he had received delivery of the car, the car remained in C.'s garage, in his possession, and under his control. On August 9, 1935, C. let the car on hire under a further hire-purchase agreement to the defendant, who took it in good faith and without notice of the transaction between C. and T. In an action by the plaintiff company to recover the car from the defendant:—

Held, that C., having sold the car to the plaintiff company, had continued in possession of it within the meaning of s. 8 of the Factors Act, 1889, with the result that the delivery or transfer by C. of the car to the defendant had the same effect as if C. had been expressly authorized by the plaintiff company to make the same, and the plaintiff company could not, therefore, succeed in the action.

Staffs. Motor Guarantee, Ld. v. *British Wagon Co., Ld.* [1934] 2 K. B. 305; *Mitchell* v. *Jones* (1905) 24 N. Z. L. R. 932 distinguished.

ACTION tried by du Parcq J. at Leeds Assizes.

The plaintiffs, Union Transport Finance, Ld., claimed from the defendant, Dr. W. W. Ballardie, possession of a 14 h.p.

Wolseley motor-car, or, in the alternative, 180*l.*, its value, and damages for its detention and conversion. The defendant, by his defence, denied that the plaintiffs were entitled to possession of the car. He said that on August 9, 1935, the car was the property of one W. Clark who, by a hire-purchase agreement of that date, agreed to let him the car, with an option to purchase it, on the conditions laid down in the agreement, in consideration of the payment by him of 140*l.* on the execution of the agreement and 4*l.* 15*s.* a month for twenty-four months. Alternatively, the defendant pleaded that if, contrary to his contention, Clark was not at the material times the owner of the car, on August 9, 1935, he was in possession of the car as a mercantile agent with the consent of the owners thereof, and the defendant executed the hire-purchase agreement of that date and took possession of the car in good faith and without notice that Clark had no authority to dispose of it. In the further alternative the defendant pleaded that, if Clark was not the owner of the car, he was at all material times in possession of it as a vendor.

By their reply the plaintiffs said that on May 17, 1935, Clark sold the car to them and that on the same day they hired the car to one Felton under a hire-purchase agreement of that date. They alleged that Felton had broken certain terms and conditions of that agreement whereby they were entitled to retake possession of the car. They denied that the car was in Clark's possession on August 9, 1935, with their consent, or as mercantile agent, or as vendor.

The following statement of the further facts in the case is taken from the judgment:—

" The plaintiff company, in the course of their business, buy motor-cars for cash in order to let them under hire-purchase agreements to would-be purchasers who are not prepared to pay the whole purchase price at once. In May, 1935, their manager at Leeds was one Thom, who had authority to buy cars on behalf of the company, but was not permitted to enter into hire-purchase agreements without express authority in each case. Thom was on friendly terms with Clark, who had lent him money, some of which remained due, for his private needs.

"In May, 1935, Clark (who was adjudicated a bankrupt early in 1936) was short of money, and he appears to have conceived a plan by which he could obtain an advance from the plaintiff company. He had in his employment a young clerk, twenty-one years of age, who lived with his mother in a small house three or four miles from Wakefield, and contributed 32*s*. 6*d*. each week to the expenses of the household out of the 2*l*. a week which he earned. This young man, Felton by name, had no private means at all, and was in no position to buy a car on any terms. He was, however, induced by Clark to sign a 'Proposal for Hire-Purchase' on one of the plaintiff company's printed forms. This proposed that a first payment of 60*l*. should be made in cash, and the balance of the price was to be payable by eighteen monthly rents of 11*l*. 2*s*. Clark had previously asked Thom to buy the Wolseley car on behalf of the plaintiff company with a view to its being let by them on hire-purchase terms to Felton and Thom had consented. Thom was a constant visitor at Clark's garage, so that he knew Felton. According to his own account, he was not greatly surprised at the suggestion that Felton should incur liability for such a substantial sum. He said in evidence that he thought that Felton might be earning as much as 4*l*. a week. The proposal gave Felton's age incorrectly as twenty-four, accurately stated his private address, gave the address of his employer Clark as his 'business address,' and in answer to the question: 'For what purpose will the vehicle be used?' replied 'Pleasure.' Felton's recollection is that he signed the proposal form in blank, and he is probably right. It is fair to him to say that I thought him an honest witness. His youth and inexperience caused him to fall in with suggestions the full significance of which was possibly not apparent to him.

"Thom appears to have had no scruples about helping Clark to carry through the transaction, although he must, I am convinced, have known that it was not genuine. He drew a cheque in Clark's favour for 180*l*., 60*l*. having been deducted from the 240*l*. in respect of the first payment. He says that he did not inquire whether Felton had paid this 60*l*.

If he had questioned Felton he would have been told that he had paid nothing. Felton, on the same day on which he signed the proposal form, signed an agreement which was subsequently completed on behalf of the plaintiff company by their general secretary. By it the hirer agreed not without the previous consent of the owners to change the permanent garage of the vehicle, which was stated to be 'now situate at 30 Manor Road, Ossett,' the house, not in fact equipped with a garage, where Felton lived with his mother. By the same clause of the agreement the hirer was 'not to part with the possession or control of the vehicle.' The agreement was declared to be 'personal to the hirer and not assignable by him.' Finally, Felton signed an 'Acknowledgment of Delivery,' acknowledging having received delivery of the vehicle. This document contains a warning in heavy type: 'Important. This form is not to be signed until delivery has been taken and the vehicle accepted.'

"In fact, the whole transaction was colourable in the sense that Clark, Felton, and (as I am compelled to infer from the circumstances of the case and his own admissions) Thom never intended that Felton's part in it should be a real one. It was never intended by any of them that the car should be delivered to Felton either by its physical transfer to his custody or by Clark submitting to hold it as his bailee. On the contrary, it was intended that the car should remain, as it did remain, in the possession and under the control of Clark. Felton never used it except on his master's business and by his master's orders. Whatever right he may have had to the possession of the car, he never sought to exercise it, and I have no doubt that it had always been understood between him and Clark, with the connivance of Thom, that he never would exercise it. To any one unacquainted with the contents of the documents to which I have referred, there was nothing to indicate any change in the ownership or in the possession of the car. Felton no doubt realized that he was assuming a serious liability *vis-à-vis* the plaintiff company, but Clark assured him that he would not be called upon to meet it. In fact, Clark made such payments as were made to the plaintiff company, and in September, 1935, arranged with the plaintiff company that notices demanding payment should be sent to him, and not to Felton."

Wrangham for plaintiff company.
Maurice Lyell for defendant.

Cur. adv. vult.

Dec. 17. DU PARCQ J. read the following judgment: On August 9, 1935, the defendant in this action, Dr. Ballardie, took on hire from one Walter Clark, of the Manor Road Garage, Wakefield, a Wolseley saloon motor-car. His agreement with Clark contained an option to purchase the car, which was delivered to him and remains in his possession. It is admitted that the defendant received the car in good faith, and without notice of any previous sale by Clark. The plaintiff company now claim to be entitled to the possession of the car and bring this action against the defendant for detinue and conversion. By their reply they allege that Clark sold the motor-car to them on May 17, 1935.

[His Lordship stated the facts as set out above and continued :] In these circumstances the defendant says that the effect of s. 8 of the Factors Act, 1889, is to give him a good title. He relies on these material words : " Where a person, having sold goods, continues, or is, in possession of the goods . . . . the delivery or transfer by that person . . . . of the goods . . . . under any sale, pledge, or other disposition thereof . . . . to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same." On the facts as I have stated them, the words of this section seem to be satisfied exactly. It was submitted, however, on behalf of the plaintiff company that an answer to the defendant's contention is to be found in the principle applied by MacKinnon J. in *Staffs Motor Guarantee, Ld.* v. *British Wagon Co., Ld.* (1), following *Mitchell* v. *Jones.* (2)

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(1) [1934] 2 K. B. 305.

(2) (1905) 24 N. Z. L. R. 932.

I have carefully considered both these decisions. If I may say so with respect, I do not doubt the correctness of either of them, but in my opinion they have no application to the facts of the present case.

In *Mitchell* v. *Jones* (1) five judges of the Supreme Court of New Zealand held that the provisions of a section not materially different from s. 8 of the Factors Act, 1889, did not apply to cases in which, the original sale having been completed by delivery, a different relation was subsequently created between the parties to it under another contract, as where the goods were bailed or leased back to the vendor. In his judgment Stout C.J. said: "In this case the person who sold the goods gave up possession of them, and gave delivery of them to the buyer. The relationship, therefore, of buyer and seller between them was at an end. It is true that the seller got possession of the goods again, but not as a seller. He got the goods the second time as the bailee of the buyer." Williams J. put the point shortly when he said that the section does not "apply where a sale has been absolutely final by delivery, and possession has been obtained by the vendee." In the present case the sale to the plaintiff company was not completed by delivery, and the plaintiff company's contention derives no support from the reasoning of the learned judges.

It is true that MacKinnon J., in the case cited (2), extended the principle of the decision to a case where the original sale was not completed by physical delivery. He based his decision on the ground that the original vendor's possession of the lorry there in question, at the time when those who were relying on the section made their bargain with him, was not the possession of a seller who had not yet delivered the article sold to the buyer, but was the possession of a bailee under a valid hire-purchase agreement made with that buyer. Mr. Wrangham, on behalf of the plaintiff company, contends that, although the motive of Clark, Felton, and Thom may have been to deceive and defraud the plaintiff company, they nevertheless intended to enter into the transactions into which they purport to have entered, and he says that, if that is so,

(1) 24 N. Z. L. R. 932.

(2) [1934] 2 K. B. 305.

Clark, after May 17, 1935, must have continued in possession of the car, not as a seller who had not yet delivered it to the buyer, but as the bailee of Felton who, being entitled to the possession of it, had acknowledged to the plaintiff company that he had taken delivery of it.

In my opinion, this contention is unsound. At different stages of this transaction the plaintiff company and Felton had a right to possession of the car, but neither of them had exercised the right at the date of the delivery of the car to the defendant. It is a mistake to suppose that because the plaintiff company had entered into a contract with Felton which gave the latter a right to possession of the car, the vendor at once became the bailee of Felton. A bailment consists in the delivery of an article upon a condition or trust: see *Reg.* v. *McDonald* (1), per Lord Coleridge C.J. There need not be physical delivery. It is not essential that the bailor should ever have had possession independently of the possession of the bailee: " A man may become the bailee of another either by attorning to him, or by receiving a thing for him in pursuance of an undertaking to that effect ": see the contribution of Mr. R. S. Wright, afterwards Wright J., to Pollock and Wright's Possession in the Common Law, published in 1888, at p. 161.

It is true that Felton had agreed with the plaintiff company that he would keep the car in his non-existent garage, and would not part with the control of it, and that he had stated to them, untruly, as I find, that he had taken delivery of the car. It is not the fact, however, that Clark ever attorned to Felton, and Clark's conduct—as Thom, the plaintiff company's agent in the purchase of the car, well knew—was inconsistent with the view that he had attorned to him. As Clark never gave possession of the car to Felton, the plaintiff company's contention is not supported by the fact that he had on January 3, 1935, entered into an agreement with them to " re-possess " cars let on hire-purchase terms in the event of a hirer " defaulting in payment."

Mr. Wrangham argued alternatively that Felton must be regarded as a mere nominee for Clark, that it followed that Clark was to be regarded as himself a party to the hire-purchase agreement, and that, therefore, his position was precisely the same as that of the vendor in the case decided by MacKinnon J. The answer to this ingenious contention is that the facts of the case in no way support it. Whatever may be said of Felton, he was not a nominee for Clark in the sense in which Mr. Wrangham used the word. The terms of the contract preclude that possibility. It was a contract "personal to the hirer," and the plaintiff company might well have refused to make such a contract with Clark.

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(1) (1885) 15 Q. B. D. 323, 327.

In my opinion, the defendant is entitled to rely on s. 8 of the Factors Act, 1889, and the disposition of the car in his favour must be taken to have had the same effect as if Clark had been expressly authorized by the plaintiff company to make it.

I have not found it necessary to express any opinion on the other contentions on behalf of the defendant which are raised on the pleadings, and were argued before me, as in my view the point with which I have dealt is sufficient to dispose of the case.

In the result there must be judgment for the defendant, with costs.

Judgment for defendant.

Solicitors for plaintiffs: *Peacock & Goddard, for H. E. Ward & Co., Chesterfield.*

Solicitor for defendant: *H. Huband Harper.*

G. F. L. B.

1937
Jan. 12, 27.

SMITH *v.* BENABO.

Metropolis—Erection of dead shores in street—Statute—Implied repeal by subsequent inconsistent statute—General Paving Metropolis Act, 1817 (57 *Geo.* 3, *c. xxix., s.* 75)—*Metropolis Management Act,* 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 122, 123.

Sect. 75 of the General Paving Metropolis Act, 1817 (Michael Angelo Taylor's Act), is impliedly repealed by ss. 122 and 123 of the Metropolis Management Act, 1855. Therefore a charge, framed under s. 75 of the Act of 1817, of setting up dead shores in a public street without a licence, failed, the same offence, with different penalties and procedure, being dealt with in ss. 122 and 123 of the later Act.

Semble, the dead shores could properly be described as hoards or scaffolding.

CASE stated by a Metropolitan Police Magistrate.

At a court of summary jurisdiction, sitting on June 15, 1936, at Thames Police Court, an information was preferred by James Henry Smith, a street inspector (hereinafter called "the appellant"), against Rebecca Benabo (trading as Chas. Benabo & Sons) (hereinafter called "the respondent"), for that she in March, 1936, at No. 4 Wicker Terrace, E.1, in the Metropolitan police district, did unlawfully set up two dead shores in the said street without a licence in writing from the borough engineer and surveyor of the borough of Stepney, contrary to s. 75 of 57 Geo. 3, c. xxix. (the General Paving Metropolis Act, 1817, commonly called Michael Angelo Taylor's Act).

Upon the hearing of the said information the following facts were proved or admitted: Wicker Terrace was a public street and therefore within the said statute, as extended and applied by s. 73 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102). On March 23, 1936, the appellant found on the footway outside No. 4 Wicker Terrace two dead shores which were resting upon a baulk of timber, which had been erected, placed or set up in the position aforesaid by the respondent as a support to the building and for the purpose of securing the safety of the premises, which were in danger of falling down, as a preliminary to repairs of a structural nature. These dead shores consisted of two baulks of timber 8 feet in length and between 6 and 7 inches by 4 inches in width set upright on the footpath of the said street between the kerb and the front of the said premises, about 12 feet apart from each other, in the centre of the footway, which was about 5 feet wide, at a distance of 2 feet 6 inches from the building line of the said premises. They rested upon another baulk of timber which was about 15 feet in length and about 12 inches wide and 4 inches thick. No licence had been obtained by the respondent.

By s. 75 of the Act of 1817 it was forbidden to erect in any public place any " hoard or scaffolding " or " any posts, bars, rails, boards, or other thing, by way of inclosure, for the purpose of making mortar, or of depositing or sifting, screening, or slacking any bricks, stone, lime, sand, or any other materials for building or repairing any house or other tenement or erection, or for other works, or for any other purpose " without a licence from the surveyor of the pavements of the district.

By s. 122 of the Metropolis Management Act, 1855, no person may " erect or set up in any street any hoard or fence or scaffold for any purpose whatever, or any posts, bars, rails, boards, or other things by way of inclosure, for the purpose of making mortar, or of depositing bricks, lime, rubbish, or or other materials, without a licence . . . . ."

On the part of the appellant it was contended : (*a*) That the setting up of the said dead shores was prohibited by s. 75 of the General Paving Metropolis Act, 1817, unless the leave or licence therein mentioned was first obtained ; (*b*) That the dead shores came within the description of " posts, bars, rails, boards, or other thing " the erection, placing or setting up of which without such leave or licence is prohibited by the said s. 75 ; (*c*) That the erection, placing or setting up in a street of posts, bars, rails, boards or other thing for any purpose is prohibited and that the prohibition against such erection, placing or setting up was not limited to the erection, placing or setting up of posts, bars, rails, boards, or other thing by way of inclosure only, and (*d*) That, alternatively, the dead shores were scaffolding within the meaning of s. 75 of the Act of 1817.

For the respondent it was contended: (*a*) That s. 75 of the Act of 1817 was impliedly repealed by the effect of the enactment of ss. 122 and 123 of the Metropolis Management Act, 1855; (*b*) That the prohibition in s. 75 so far as it related to the erection without licence of "posts, bars, rails, boards, or other thing" is a prohibition against the erection, placing or setting up of any "posts, bars, rails, boards, or other thing" by way of inclosure only and that unless the erection of the said dead shores was by way of inclosure no licence need be obtained; (*c*) That the dead shores were not scaffolding within the meaning of the Act; and (*d*) That the dead shores had not been erected by way of inclosure and that they did not form an inclosure and were incapable of being used as an inclosure for any purpose.

The magistrate was of opinion (*a*) That, having regard to s. 247 of the Metropolis Management Act, 1855, s. 75 of the General Paving Metropolis Act, 1817, was not repealed by the enactment of ss. 122 and 123 of the Metropolis Management Act, 1855; (*b*) That the prohibition in s. 75 in so far as it applied to the erection without licence of any posts, bars, rails, boards, or other thing was a prohibition against their erection or placement by way of inclosure only; that the words in the said section "or for any other purpose" qualified the words "by way of inclosure" and referred to the object of such inclosure, and that unless the erection, not being that of a hoard or scaffolding, was by way of inclosure, the said section did not require a licence; (*c*) that the dead shores were not erected by way of inclosure, inasmuch as so erected and placed they did not form an inclosure nor were they used or capable of being used for any purpose to which an inclosure might be put; and (*d*) That the dead shores were not scaffolding, inasmuch as they were not erected or used or capable of being used as an appliance for the accommodation of workmen and/or materials, there being no platform on which a workman could stand or materials be placed, and he dismissed the said information, but stated this case.

Macaskie K.C. and *T. Dawson* for the appellant. The learned magistrate was wrong in holding that s. 75 of the General Paving Metropolis Act, 1817, only prohibited the erection on the highway of "posts, bars, rails, boards, or other thing" if they were erected "by way of inclosure." The penal portion of the section provides that if any person shall erect any posts, bars, etc., "for the purposes aforesaid, or for any other purpose," he shall be liable to a penalty. That shows that the erection of posts, bars, etc., is not limited to erection by way of inclosure.

[He was stopped.]

J. H. C. Goldie for the respondent. Sect. 75 of the Act of 1817 is impliedly repealed by ss. 122 and 123 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), for if a later statute again describes an offence created by a former statute and imposes a different punishment and varies the procedure, the earlier statute is impliedly repealed by the later one: per Lord Campbell in *Michell* v. *Brown* (1), and Maxwell's Interpretation of Statutes (7th ed.), p. 162. On this ground it was held in *Fortescue* v. *Vestry of St. Matthew, Bethnal Green* (2), that s. 72 of the Act of 1817 was impliedly repealed by s. 119 of the Metropolis Management Act, 1855. In the present case both s. 75 of the Act of 1817 and ss. 122 and 123 of the Act of 1855 are directed against the same mischief, but the punishment and procedure under the two Acts are different. Under s. 75 of the Act of 1817 the penalty is 10*s.* for every day of the continuance of the offence; under s. 123 of the later Act it is a sum not exceeding 5*l.* and a further sum not exceeding 40*s.* for every day. By s. 75 materials are to be kept until both penalty and charges are paid, but under s. 123 only until charges are paid; and the provisions as to the sale of materials differ; and there are further provisions in the Act of 1855 with regard to the proceeds of sale being insufficient to cover charges which do not appear at all in the Act of 1817. A footnote to s. 75 of the Act of 1817 at p. 630 of the 1st ed. (1863) of Woolrych's Metropolis Local Management Acts, says: "This provision is probably superseded by the 123rd section of 18 & 19 Vict. c. 120" (the Act of 1855). And s. 247

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(1) (1858) 1 El. & El. 267, 274.

(2) [1891] 2 Q. B. 170.

of the Act of 1855 contemplates repeal by that Act by reason of inconsistency with earlier Acts, and that removes the chief objection against the argument for repeal by implication.

[Maxwell's Interpretation of Statutes, 7th ed., p. 142, was referred to.]

Macaskie K.C. in reply. Sect. 75 of the Act of 1817 deals with a wider offence than that dealt with by the later Act and is not, accordingly, repealed by it.

[*Fortescue* v. *Vestry of St. Matthew, Bethnal Green* (1), was referred to.]

Cur. adv. vult.

1937. Jan. 27. The judgment of the Court (LORD HEWART C.J., SWIFT and GODDARD JJ.) was read by

GODDARD J. This is a special case stated by a metropolitan magistrate, sitting at Thames Police Court, who dismissed an information preferred against the respondent, Rebecca Benabo, charging her with setting up in Wicker Terrace, Stepney, two dead shores without obtaining a licence from the borough engineer and surveyor, contrary to s. 75 of the statute 57 Geo. 3, c. xxix., commonly called the General Paving Metropolis Act, 1817. The dead shores consisted of two baulks of timber 8 feet long and between 6 and 7 inches by 4 inches square, and supported another baulk or girder about 15 feet long, which rested upon them; and were so set up to support a house while structural repairs were in progress. These dead shores encroached upon the footway of the said street. Sect. 75 of the Act of 1817, under which the respondent was summoned, omitting words which are immaterial for present purposes, provides that "no person . . . . shall erect . . . . in any street or other public place . . . . within the jurisdiction of this Act . . . . any hoard or scaffolding, or place or erect any posts, bars, rails, boards, or other thing, by way of inclosure, for the purpose of making mortar, or of depositing or sifting, screening, or slacking any bricks, stone, any house . . . . or for other works, or for any other purpose, lime, sand, or any other materials for building or repairing without leave or licence . . . . of the surveyor . . . . of the pavements of such parochial or other district," who it is provided shall issue a licence specifying certain conditions and the payment of a fee. Then the section provides that if any person erects any such hoard or scaffolding or any inclosure, posts, bars or rails, or any other matter or thing for the purpose aforesaid or any other purpose without a licence, he shall be liable to a penalty of 10*s*. a day during the time that the erection continues, and gives power to the local authority to remove the erection, and gives directions as to how the material out of which it is constructed is to be disposed of by them.

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(1) [1891] 2 Q. B. 170.

At the hearing the facts were not in dispute; and the contentions of the respondent can be grouped under two heads. First, it was submitted on her behalf that the section under which she was summoned was repealed by the effect of ss. 122 and 123 of the Metropolis Management Act, 1855; and, secondly, that the dead shores were not hoards or scaffolding; and that in so far as the section prohibited the erection of posts, bars, rails, boards or other things without a licence, these dead shores were not put up by way of inclosure and, therefore, no licence was required. The learned magistrate, who did not have the advantage of an argument as full as that which counsel addressed to this Court, and to whom the case of *Fortescue* v. *Vestry of St. Matthew, Bethnal Green* (1), was not cited, ruled against the respondent on the first point, and in her favour on the second. The Court have already intimated that in their opinion the contention of the respondent that the section has been repealed is correct, and it is, therefore, unnecessary to express any opinion whether the learned magistrate was right in his view that the prohibition affecting posts, boards and the like applies only where they form an inclosure. But in our opinion these dead shores can properly be described as hoards or scaffolding for the purpose of the General Paving Metropolis Act, 1817, and also of the Metropolis Management Act, 1855. One of the objects of the Act of 1817

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(1) [1891] 2 Q. B. 170.

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was to deal with obstructions to the footpaths and pavements of the Metropolis, and we see no reason for holding that these words were intended to have a technical or limited meaning. A construction that may be placed upon such words for the purpose, for instance, of the Workmen's Compensation Acts is not necessarily that which is to be applied when a wholly different class of statute is being considered.

Now the Act of 1817 was a private Act, often known as Michael Angelo Taylor's Act, after a prominent politician, the member for Poole, who introduced and carried it through the House of Commons. It is true that by s. 148 it is to be deemed a public Act, of which judicial notice is to be taken; but before s. 9 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), provided that judicial notice should be taken of private as well as of public Acts, it was a common device to insert some such provision in a private Act, to obviate the necessity of formal proof of it having to be given when it came in question in the Courts. In the days before 1855 many private Acts were obtained by the vestries of London conferring powers of local government upon them, and, no doubt, one of the reasons which led to the passing of the Metropolis Management Act, 1855, was the desirability of securing a uniform code and uniform administration throughout the rapidly growing district comprised in the Metropolis as defined by the Act. Sect. 122 of that Act provides in substance that it shall not be lawful to erect or set up in any street any hoard or fence or scaffold for any purpose whatever, nor any posts, bars, rails, boards or other things by way of inclosure for making mortar or depositing building materials or rubbish without a licence from the clerk or surveyor of the local authority, and the licence is to contain the same particulars as were required in a licence granted under the earlier Act. Sect. 123 provides penalties different from and more severe than those provided in the Act of 1817, and there is also some difference in the provisions as to the pulling down and disposing of an offending structure. Sect. 247 expressly repeals all Acts in force in any parish to which the Act extends so far as their provisions are inconsistent with those of the later Act. Apart

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from the provisions of this latter section, it is a well settled rule of construction that if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute: see *Michell* v. *Brown* (1), per Lord Campbell. A useful illustration of this rule was cited by Mr. Goldie, *Fortescue* v. *Vestry of St. Matthew, Bethnal Green* (2), to which we have already referred. The two Acts there in question were the same as those which we are now considering; and the Court held, after reviewing all the authorities, including the passage from *Michell* v. *Brown* (1) to which we have referred, that s. 119 of the Act of 1855 impliedly repealed s. 72 of Michael Angelo Taylor's Act, the Act of 1817, the subject-matter being the same, while the penalties and procedure were different. Now, in our opinion s. 122 of the Metropolis Management Act, 1855, in substance describes exactly the same offence as that which is described by s. 75 of the General Paving Metropolis Act, 1817. That there is some difference in the wording of the two sections is true; but the object and the subject-matter are the same, and we do not consider that the presence of some general words in the latter section of the earlier Act, which do not appear in terms in the later Act, prevent the application of the doctrine to which we have referred. Substantially the two sections deal with the same offence, and s. 123 provides for different penalties, and some difference in procedure from those imposed and prescribed by the earlier Act. It follows that, in the opinion of the Court, s. 75 of the General Paving Metropolis Act, 1817, is repealed, both by reason of the rule to which we have referred and also by s. 247 of the Metropolis Management Act, 1855. But, so that there may be no misapprehension, we think it well to emphasize that this judgment gives no countenance to the idea, if it exists, that persons are at liberty to erect such structures as were erected in this case without a licence from the local authority. All that we decide is that proceedings were taken under a statute

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(1) 1 El. & El. 267, 274.

(2) [1891] 2 Q. B. 170.

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which has been repealed, instead of being taken under one which is now in force. The appeal, therefore, fails, and must be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *Edward Fail.*
Solicitors for respondent: *C. V. Young & Son.*

W. L. L. B.

BEETHAM *v.* JAMES.

1937
Jan. 27;
Feb. 2.

[1936. B. 1364.]

Seduction—Master and servant—Parents of girl living together but not married—Damages claimed by putative father—Putative father head of household in which girl is living and performing household duties—Putative father's right of action unaffected by parents' unmarried state—Foundation of action relationship of master and servant—Costs—R. S. C., Ord. XLV, *r.* 1.

The foundation of an action for seduction is not the relationship of parent and child but that of master and servant, and the right of a putative father to sue for damages for the seduction of his daughter is not affected by the fact that he is not married to the girl's mother, if at the time of the seduction the girl is living, and performing services to him, in the household which he maintains and of which he is the head and master.

ACTION by plaintiff to recover damages for the seduction of his daughter by the defendant, by reason whereof she became pregnant of a child and the plaintiff in consequence lost her services, and also incurred loss and expense.

The case for the plaintiff, shortly stated, was that in the month of September, 1935, when the seduction took place, his daughter, who was then twenty-two years of age, was performing certain actual services for him in his household, and was also paying to him, out of the wages which she earned in outside employment, a weekly sum towards her maintenance, and that during her illness he lost both her services and the weekly contribution and incurred medical and other expenses.

The action was tried before Atkinson J. and a common jury, and at the hearing the plaintiff, and also the mother of the girl, stated in evidence that they had been married at a named church at Weobley, Herefordshire. When pressed in cross-examination, however, the mother admitted that she and the plaintiff had never been married. For the defendant it was thereupon submitted that the action would not lie; but it was agreed to take the verdict of the jury and adjourn the point of law for further argument. The jury awarded the plaintiff 50*l.*

Jan. 27. Further argument.

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E. Holroyd Pearce for the defendant: There has never been a case of a putative father bringing such an action as this. Apart from a bastardy order a putative father has no rights or obligations in respect of an illegitimate child (see dictum of Cockburn C.J. in *Reg.* v. *Inhabitants of Brighton.* (1) Until the girl reached the age of twenty-one her services were owing to her mother, and the plaintiff has shown no change in the circumstances after that time which transferred the services to him. Where there is no marriage there is no presumption that the father is the master and head of the household. To succeed the plaintiff must make out an affirmative case that the de facto services of the daughter were rendered to him.

He also cited *Hamilton* v. *Long* (2) and *Peters* v. *Jones.* (3)

John H. Bassett for the plaintiff. If in a case where the parents are unmarried it is to be presumed that the duty of the girl, until she reach the age of twenty-one, is to the mother, that presumption is capable of being rebutted. When the girl reaches twenty-one there is an absence of presumption, there is no longer a duty to the mother, and it must be assumed that the services are being rendered to the head of the household in which the girl is living—in this case the father. For the purpose of running the household an unmarried woman living as wife, and held out by the man as his wife, is in a position no different from that of a wife.

He cited *Watson* v. *Threlkeld.* (4)

Cur. adv. vult.

Feb. 2. ATKINSON J. In this case the plaintiff is claiming damages for the seduction of his daughter. The case opened was that the plaintiff had been happily married for 34 years, and that he was entitled to very substantial damages for the dishonour inflicted upon him, and for the blow caused to his pride. The plaintiff went into the box and gave evidence of his happy married life. He said he had three children, the eldest a widow, a married son, and a daughter Mabel, aged twenty-two in July, 1935. His case was that Mabel had been

(1) (1861) 1 B. & S. 447, 451.

(2) [1903] 2 I. R. 407, 411.

(3) [1914] 2 K. B. 781, 784, 787.

(4) (1798) 2 Esp. 637.

seduced in September of that year, and had had a miscarriage in February, 1936, causing her to be ill in bed for six weeks.

He was asked in cross-examination if he knew that Mabel had told the defendant that her parents were not married. He said she could not have done so, or that if she had it was a lie, and in answer to further questions he swore again that he and his wife had been married on July 24, 1903, at a certain church, which he named, at Weobley, Herefordshire. Mrs. Beetham was called, and also swore that she and the plaintiff had been married for thirty-four years, and were married at the church and place named. When pressed as to the date, she hesitated, and ultimately admitted that she and the plaintiff never had been married. Mabel, later on, said that it had been agreed between them that they should all say the parents were married, to save the mother's reputation.

The admission that the plaintiff was not married to the mother of Mabel raised the question whether this action could lie. It was agreed to take the verdict of the jury, on the assumption that the action did lie, and to argue the point later. The jury found for the plaintiff for 50*l*.

Before the argument I asked if it was agreed that, if the decision of the point left over involved the decision of any question of fact, I should decide it. I understood that both counsel agreed. The facts were that Mrs. Beetham (I will continue to call her Mrs. Beetham) went with the three children to live in Llandaff, and that she brought them up there. The plaintiff's work took him all over the country, and he went to them only in and for the holidays, and so on; but four years ago they came to London—the plaintiff's work was now more in London than in the country—and he took a house at Bedford Park. For the last few years they have all lived together there. In 1935 the mother, the son—a young man, then unmarried—and Mabel were living there, and also the plaintiff when he was not away on business, as he very frequently was.

After the verdict I asked, and was told, that the plaintiff paid the rent of the house. I should have assumed that to be the fact if there had been no evidence to the contrary.

There was no suggestion that Mrs. Beetham earned, or had earned, any money. Mabel had been employed for two years in the C.A.V. works—at any rate since March, 1934—and had paid to her mother 1*l.* a week towards the household expenses. I have no doubt that the son also contributed something until his marriage in 1935. There was no evidence as to what the plaintiff paid, but there is no reason to suppose that he did not bear the main burden. Mabel was away at work most of the day, but in the evening she helped to wash up, and also helped her mother with the ironing and did her own room. Those were the services on which the claim was based, and it was not suggested that they were not sufficient on which to base a claim.

If the plaintiff had been married to Mrs. Beetham there is no doubt that in law these services would be deemed to have been rendered to him, and that he, and he only, could have brought this action. It is argued for the defendant that as the plaintiff was not married to the mother of the girl it is impossible to hold that these services, so personal to the mother, were rendered to him. Normally, if a girl is under twenty-one the father need not prove actual service—he can rest his claim on a legal right to her services—but it is important to remember that that right rests upon a legal fiction that a girl living with her parents is in the position of a servant. If the girl is over twenty-one the father must prove either a contract of service or actual service, and it is well established that where actual services are rendered, whatever their character, and however personal to the mother, they are deemed to be rendered to the father and not to the mother, and are rendered to him not as the father but in his capacity as master of the house and home.

Does it make any difference if the father is not married to the mother? The argument for the defendant is this: before the girl was twenty-one the duty of service was to the mother alone, the unmarried father had no right to service, and the services actually rendered while she was not of age must be deemed to have been rendered in discharge of that duty to the mother, and it is impossible to presume that the mere happening of the age of twenty-one changes the person to whom the services are rendered.

I think the fallacy in this argument is the assumption that the duty, while the girl is under twenty-one, is to the mother. In my opinion the duty of service is to the parent, or person in loco parentis, in whose household the girl is living, and that is the master of the house—the one who pays the rent and household expenses. When the girl becomes twenty-one there is no presumed relationship of master and servant. That relationship has to be proved by proof of contract or actual service, and the question then is one of fact. To whom were the services rendered?

There appear to me to be two cases which really put the matter beyond dispute. The first is *Hamilton* v. *Long*. (1) In that case the plaintiff was a widow who brought an action for the seduction of her daughter. The seduction took place in the lifetime of the claimant's husband, the loss of service took place after his death, and the action was brought by the widow. It is well established that the relation of master and servant has to be in existence at the date of the seduction and of the loss of service, and the question in that case was to whom were the services rendered before the husband died, that is, at the date of the seduction. The judgment of Lord O'Brien C.J. indicates quite clearly what is the test. He says (2): "Now, at common law the action would not, in my opinion, be maintainable for this reason—namely, that to sustain an action of seduction it must be shown that the act of seduction took place whilst the relation of master and servant existed, and that relation in the father's lifetime existed exclusively between the father as head of the family, and the daughter as his child, and one of the family and one of the household which he maintained. The wife may have been alive, and have directed the daughter in the discharge of her domestic duties, but these duties were rendered in respect of the house and family of which the father was the head; and, whilst the father was in that position, in the eye of the law the relation of master and servant was confined to him exclusively."

(1) [1903] 2 I. R. 407.

(2) Ibid. 411.

It is there made quite clear that it is not because a man is the girl's father and it is not because he is married to her mother that the services are presumed to be rendered to him, but because he is head of the household.

Then there is the English case of *Peters* v. *Jones*. (1) The girl in that case had been adopted by Mrs. Peters. She was not the child of Mrs. Peters' husband—there was no relationship—and the seduction took place while Mr. Peters was alive. Then he died and the adoptive mother was affected by the loss of service. The question was to whom the services were being rendered at the date of the seduction, and it was held that they must be deemed to have been rendered to Mr. Peters. It could not have been because he was the girl's father—for he was not. The whole point was that he was the head of the household, and that was enough.

Avory J., in a most lucid judgment, makes that clear. He says (2) : " I think it is plain that the foundation of the action is not the relationship of parent and child, but that of master and servant."

Then, towards the end of his judgment, the learned judge said (3) : " The moment that one appreciates that the action is based on the relationship of master and servant and not on that of parent and child one sees that the only question for determination is, who was the girl's master at the material times ? There is only one answer to that question. Mr. Peters was the master ; Mrs. Peters was not the mistress of the servant, and so she was not entitled to bring this action."

If that is the test, then in this case, to my mind, there can be only one answer to the question which I have to decide. The plaintiff was just as much the master of this household as he would have been if he had been married at all times to the girl's mother. The plaintiff always held out the mother as his wife, and everything was the same as if they had been married. He assumed the duties of a husband, and the mere fact that they had not been married cannot affect his position as master of the house. I do not say that there may not be cases where the fact of there being no marriage of the parents

(1) [1914] 2 K. B. 781. (2) Ibid. 784. (3) Ibid. 787.

may be a material fact to be considered. For instance, there might be a case where a man was paying mere occasional visits to his mistress, and the question was in doubt as to whose was the establishment; but in a case like the present I cannot think that the position is affected by the fact that the plaintiff and the mother of the girl are not married.

I have been troubled as to how to deal with the costs. The plaintiff lied deliberately upon a matter of the greatest importance. His lies made the result of the case a certainty, whereas the truth at any rate left it open to argument. Apart from that it was most material to the question of damages. He could hardly have thought it was worth while to publish to the world the news of his daughter's shame for the sake of the trifling damages that he would get if the truth were known. The damages could only be substantial if the jury were led to believe that it was a grievous wrong done to married people, who had suffered a blow to their pride and sense of honour. That is the main head of damage in this case. Once the services are proved—they need not be worth much—it is the insult to the parents' pride and honour that matters, and the plaintiff could only hope to recover real damages if he could establish that he and the mother of the girl were indeed happily and legally married. That being so, they agreed to come and tell lies, and it was only because Mrs. Beetham, I suppose, had forgotten the date agreed upon for the marriage that the truth came out. It was agreed by Mr. Bassett, for the plaintiff, that conduct of this sort was conduct which entitled me to exercise my discretion and depart from the general rule that where there is a verdict of a jury costs follow the event, and the order I shall make as to costs in this case is that the plaintiff shall get his taxed costs, less the sum of 20*l.* There will be judgment for the plaintiff for 50*l.*, with taxed costs, less the sum of 20*l.*

Solicitors for plaintiff: *Schultess-Young & Dupont.*
Solicitor for defendant: *Bickerton Pratt.*

A. W. G.

District (Receiver) *v.* Tatum. [1948] 1 All E.R. 612. | *Applied.* Tatum's Case. [1948] 2 K. B. 68

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Oct. 21, 22, 23;
Nov. 18.

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[1935. B. 2065.]

Contract—Bailment—Imported foreign goods—Deposit in London bonded warehouse—Goods stolen while in warehouse—Owner of warehouse compelled by Customs authorities to pay duty—Action by owner of warehouse to recover amount of duty paid from owner of goods—No negligence on part of owner of warehouse proved—Repayment ordered—Customs Consolidation Act, 1876 (39 *&* 40 *Vict. c.* 36), *ss.* 13, 57, 85, 89, 97, 284.

The defendants were a firm of furriers who had imported from Russia a consignment of squirrel skins in August, 1934. Out of the consignment ten packages were stored by the defendants in the bonded warehouse of the plaintiffs. Whilst in the warehouse they were stolen on the night of September 7–8, 1934.

The plaintiffs as bonded warehousemen were compelled by law at the demand of the Customs to pay the duties on those packages out of their own moneys. The defendants had refused to supply the plaintiffs with the necessary funds for that purpose. The plaintiffs claimed from the defendants the amount of the duties, 823*l.* 17*s.* 10*d.*, which they had thus been called upon to pay to the Customs, on the ground that, as between themselves and the defendants, the defendants were primarily liable for the duties.

The defendants counterclaimed for 4119*l.* 9*s.* 3*d.* as being the value of the furs, on the ground that the furs were stolen by reason of the negligence of the plaintiffs and of their failure to exercise due care in the safe keeping of the goods :—

Held, (1.) that the duty of the plaintiffs with regard to the care of the goods could not be put higher than that they must do what was reasonable. They were not insurers and they had established their defence by satisfactory evidence that the precautions they took were such as reasonable and prudent care demanded. The counterclaim accordingly failed, as did the defence to the claim so far as it was based on the allegation that the loss was due to want of care in the custody of the goods;

(2.) that the Customs duties on the goods became due from the importers at the date of importation and remained so due until the goods were discharged from the custody of the Customs;

(3.) that the plaintiffs having been compelled under s. 85 of the Customs Consolidation Act, 1876, to pay the duties on the defendants' goods were entitled to be reimbursed the amount of the duties they had so paid.

Attorney-General v. *Ansted* (1844) 12 M. & W. 520 and *Moule* v. *Garrett* (1872) L. R. 7 Ex. 101 applied.

Decision of Branson J. affirmed.

APPEAL from a decision of Branson J.

The defendants were a firm of furriers, who had imported from Russia a consignment of squirrel skins in August, 1934. Out of the consignment ten packages were stored by the defendants in the bonded warehouse of the plaintiffs. While in the warehouse they were stolen on the night of September 7 and 8, 1934.

The plaintiffs as bonded warehousemen were compelled by law at the demand of the Customs to pay the duties on those packages out of their own moneys. The defendants refused to supply the plaintiffs with the necessary funds for that purpose. The plaintiffs claimed from the defendants the amount of the duties, 823*l.* 17*s.* 10*d.*, which they had thus been compelled to pay to the Customs, on the ground that, as between themselves and the defendants, the defendants were primarily liable for the duties.

The defendants counterclaimed for 4119*l.* 9*s.* 3*d.* as being the value of the furs, on the ground that the furs were stolen by reason of the negligence of the plaintiffs and of their failure to exercise due care in the safe keeping of the goods.

Branson J. held that there was no breach of duty on the part of the plaintiffs and that they were not liable to the defendants on their counterclaim. He also held, as regards the claim for 823*l.* 17*s.* 10*d.*, that the plaintiffs were entitled to recover it.

The defendants appealed. The appeal was heard on October 21, 22 and 23.

W. L. McNair and *C. A. Roberts* for the appellants. The plaintiffs were bound to take reasonable precautions against thieves. That is the whole matter. They did not take the proper steps under their system to deal with the contingency which arose, and were therefore guilty of negligence.

[They referred to *Joseph Travers & Sons, Ld.* v. *Cooper* (1); *The Kite* (2); *Scott* v. *London & St. Katherine Docks Co.* (3);

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(1) [1915] 1 K. B. 73, 90.

(2) [1933] P. 154, 168.

(3) (1865) 3 H. & C. 596.

Halsbury's Laws of England, vol. i., p. 545, para. 1109; Customs Consolidation Act, 1876, ss. 56, 85, 98, 104.]

If there was no negligence no duty was payable. The judgment should be reversed and the defendants should have judgment on the claim.

[LORD WRIGHT M.R. The Court are not going to find negligence.]

Assuming that the theft occurred without negligence it is said against the appellants that the plaintiffs paid the money for and on behalf of the defendants. The question is whether the liability to pay certain Customs duties was a liability in these circumstances on the part of the warehousemen or the importers. It is a liability attaching to the goods, circumstances having arisen which were covered by s. 85 of the Customs Consolidation Act, 1876. A liability had accrued and it was the warehousemen's liability under that section. This view is reinforced by the liability imposed on the warehousemen under their bond.

[They referred to the Import Duties Act, 1932, ss. 1 and 3, and to Customs Consolidation Act, 1876, especially ss. 53, 56, 57, 85, 87, 98, 104.]

The importers had never become liable for duty because they never made an entry of these goods for home consumption. They only entered them for warehousing. Therefore the warehousemen are liable.

Attorney-General v. *Ansted* (1) is distinguishable, because the law in that case is different.

The second part of the case is whether there is an implied warranty that warehousemen should be repaid the money. It is submitted that there is no such implied warranty: *Taylor* v. *Stray* (2), *Dugdale* v. *Lovering*. (3)

H. U. Willink K.C. and *Eric Sachs* for the respondents. The warehousemen were compelled to pay by s. 85 of the Customs Consolidation Act. They were compelled to discharge the importers' liability. Therefore the warehousemen must be indemnified. The question is whether that liability to pay duty was a liability both on the warehousemen and on the importers or whether it was a liability solely on the importers.

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(1) 12 M. & W. 520.
(2) (1857) 2 C. B. (N. S.) 175.
(3) (1875) L. R. 10 C. P. 196.

The statutory duty is placed on these warehousemen to pay the duty on the goods deposited in their warehouse. This is part of the machinery of the collection of the duty. In *Attorney-General* v. *Ansted* (1) it was held that the importer of goods from a foreign country was liable, on the importation, to the duty of Customs payable; and that that liability was not affected by the Warehousing Act (3 & 4 Will. 4, c. 57), the effect of which was only to give the merchant, in the case of goods warehoused under it, time for payment of the duties until the goods are entered for home consumption. The judgment in that case has never been adversely commented upon. Branson J. held himself bound by that authority. See Halsbury's Statutes of England, vol. xvi., p. 308, note to s. 78.

The plaintiffs having been compelled by the Customs to pay the duties claim to be repaid by the defendants the money so paid by them on the principle stated in Leake on Contracts, 8th ed., p. 46, and based on the statement in the judgment of Cockburn C.J. in *Moule* v. *Garrett* (2) which is in the following terms: "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount." That principle exactly applies to the present case. Here the plaintiffs were under a statutory obligation under s. 85 of the Act of 1876 to pay the duty in question, and, they having paid it, there was an implied obligation on the part of the defendants to reimburse the plaintiffs the moneys so paid by them for duties.

[They also referred to *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society* (3) and *Pownal* v. *Ferrand*. (4)]

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(1) 12 M. & W. 520.

(2) L. R. 7 Ex. 101, 104.

(3) [1899] 1 Q. B. 161.

(4) (1827) 6 B. & C. 439, 443.

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W. L. McNair replied.

Cur. adv. vult.

1936. Nov. 18. LORD WRIGHT M.R. read the following judgment in which, after stating the facts, he continued : I think it convenient to deal first with the defendants' counterclaim. The allegation of negligence, if proved, would also furnish a defence to the plaintiffs' claim, because they could not recover a sum for duties paid on goods which had been lost through their negligence. Whether that allegation is made out or not is a question of fact.

The law as to the position of warehousemen in such circumstances and the extent of the duty of care which rests upon them has been discussed in various cases, but I proceed on the basis of the statement of the law on the liability of warehousemen contained in two passages from the judgments in the House of Lords in an unreported case of *Morison, Pollexfen & Blair* v. *Walton* quoted by Kennedy L.J. in *Joseph Travers & Sons, Ld.* v. *Cooper.* (1) The first passage is quoted from the judgment of Lord Loreburn in the following words : " Here is a bailee, who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him, and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision, and difficult to discover at all, what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and, if he cannot satisfy the Court that it occurred from some cause independent of his own wrong-doing, he must make that loss good." Then Kennedy L.J. says : " And so Lord Halsbury : ' It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him.' "

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(1) [1915] 1 K. B. 73, 90.

In the present case, the stealing of the goods being admitted, the plaintiffs have given evidence that they have taken all reasonable precautions to protect the goods against the risk of theft, and they say that they have satisfied the burden of proof which rests upon them and that they are outside the rulings I have just quoted.

They further rely on a statement of the rule given (in a dissenting judgment, it is true) by Lord Dunedin in *Ballard* v. *North British Ry. Co.* (1) Lord Dunedin there said: " I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion."

I think this is merely stating the same rule as that stated by Lord Loreburn and Lord Halsbury from another aspect. If the plaintiffs show that they took all reasonable and proper care of the goods, the mere fact that they were, notwithstanding, stolen is not sufficient any longer to make them liable for negligence. Their explanation is, then, that the thieves must have shown ingenuity and daring against which reasonable precautions could not avail. Hence, I think the plaintiffs discharge the burden of proof upon them if they can show that the theft took place notwithstanding that they had taken all reasonable precautions to guard against the danger.

The learned judge has held that they have shown that and I entirely agree with his conclusion. [His Lordship shortly reviewed the facts upon which the learned judge arrived at this conclusion, and continued:] I agree with the learned judge that the system adopted was a reasonable

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(1) 1923 S. C. (H. L.) 43, 54.

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and proper system, and I think that it is impossible to say by what ingenious contrivances the thieves managed to effect their nefarious scheme.

The duty of the plaintiffs cannot be put higher than that they must do what is reasonable. They are not insurers and they have established their defence here by satisfactory evidence that the precautions they took were such as reasonable and prudent care demanded.

The counterclaim accordingly fails and so does the defence to the claim so far as it is based upon the allegation that the loss was due to want of care in the custody of the goods.

The plaintiffs' claim thus depends on considerations of law. Customs duties are charged on goods under the charging section, which in this case is s. 1 of the Import Duties Act, 1932. That section provides that there shall be charged on all goods imported into the United Kingdom, subject to certain exemptions, a duty of Customs equal to 10 per cent. of the value of the goods. That means, I think, that the importer is the person who is primarily liable for the duties.

The general principle is stated in *Attorney-General* v. *Ansted.* (1) Parke B. said (2): " The defendants clearly were, by the general law, liable, as importers of the goods, to the payment of these duties." He was there referring to the system under the earlier Acts operative in 1844; but the same general principle applies under the law now in force, and under that law I think it is true to say that the duties became a debt to the Crown immediately on the importation. It is true that the actual levying of these duties is the subject of complicated machinery now to be found in the Customs Duties Consolidation Act, 1876; but throughout all that machinery there remains the basic principle that the duties are due on importation from the importer and remain due from the importer until the goods have been duly discharged from the Customs' custody.

" Importer " is defined in s. 284 in these terms: " ' Importer ' shall mean, include and apply to any owner or other person for the time being possessed of or beneficially interested in any goods at and from the time of the importation thereof until the same are duly delivered out of the charge of the officers of Customs."

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(1) 12 M. & W. 520.

(2) Ibid. 528.

The machinery embodied in the Act includes a system of bonded warehouses, of which the plaintiffs' warehouse was one. The owner of the bonded warehouse is required under s. 13 of the Act to give security by bond for the payment of the full duties chargeable on any goods warehoused with him or for the due exportation thereof. The importer of goods may make what is described as "a perfect entry" under s. 55, if he intends them to be delivered for home use, on the landing from the importing ship. A special form is provided for that purpose. In that case he must pay the duty immediately on the entry; but the importer has also the option under s. 57 of warehousing goods without payment of duty on the first entry, and for that purpose another form is provided. Such an entry was made of the furs now in question. If goods are so entered they may be dealt with by being taken out of bond for export or the goods may be entered for ships' stores. In neither of these cases will duty be payable; the goods will have been duly delivered out of the charge of the Customs.

Thus it is clear that the duties become due on importation and only cease to be due on being actually paid when the goods are taken out for home use or if they are entered for exportation or ships' stores.

The sections which deal with the entry of warehoused goods for home consumption and exportation and for their delivery are s. 97 and the following sections. Sect. 97 provides: "No warehoused goods shall be taken or delivered from the warehouse, except upon due entry and under the care of the proper officers, for exportation, or upon due entry and payment of the full duties payable thereon for home use, except goods duly delivered to be shipped as stores, in such quantities" as the Customs may direct.

It is, however, clear, in my opinion, that the importer is and remains liable for duty as at the date of the importation, though he may relieve himself of that liability either by selling the goods subject to the same liability for duties or by entering them for exportation or for use as ships' stores.

That the time at which the duty attaches is the time of importation is shown by s. 40 of the Act. The Customs Act has, however, also imposed upon bonded warehousemen a liability for the duties so due in certain events. Thus in s. 82 it is provided that a warehouseman failing to produce to an officer of Customs on request goods deposited which have not been duly cleared and delivered from the warehouse shall be liable to a penalty of 5*l.* in respect of every package or parcel not so produced, besides the duties due thereon ; and by s. 85, if goods are taken out of any warehouse without due entry, the warehouseman shall pay the duties due upon such goods.

In each of these sections the phrase is used " duties due on the goods," and I think these words refer to the duties due from the importer as from the date of importation. The purpose of these provisions appears to me to be to enable the Customs to have ready recourse to the warehouseman wherever goods are improperly removed from the warehouse. It is for this reason that the security referred to in s. 13 is taken.

In accordance with that section the plaintiffs were required to enter into and did enter into a bond in the sum of 10,000*l.*, guaranteed by a surety company, and condition 4 of the bond was in the following terms : " All goods which have been deposited or warehoused in the warehouses and not duly cleared therefrom or otherwise accounted for to the satisfaction of the Commissioners or which hereafter shall be deposited or warehoused therein shall be safely and securely kept therein until duly delivered under the law and with the authority of the proper officer of Customs and Excise for the purpose of being exported or warehoused in some approved warehouse or used as ships' stores or for home consumption upon payment of the full and proper duties of Customs and Excise chargeable thereon."

That is an undertaking that the requirements of the Act as to the payment of duty shall be duly complied with ; but, in my opinion, the obligations so imposed on the plaintiffs as warehousemen are ancillary to and by way of security for the due payment to the Customs and do not supersede the liability of the importers, though, if the warehousemen pay the duty, the importers cannot be made by the Customs to pay it over to them a second time.

In the present case a demand was made on the warehousemen under s. 85 and the Customs refused to remit the duties payable on these goods, as they were entitled to do under s. 87, which provides: "If any goods warehoused or entered to be warehoused, or entered to be delivered from the warehouse, shall be lost or destroyed by unavoidable accident, either on ship board or in removing, landing or receiving into the warehouse, or in the warehouse, the Commissioners of Customs may remit or return the duties due or paid thereon."

The duties due under that section must, I think, refer to duties due from the importers under the charging section. Sect. 87 may apply before the goods are delivered to a warehouse at all; the accident may have occurred on board the importing vessel or in removing, landing or receiving into the warehouse, and in all these cases the warehouseman cannot be liable in any sense for the duty. The only person from whom the duties are due in these cases must be the importer.

In the present case the demand on the warehouseman was made under s. 85, because the goods had been taken out of the warehouse without due entry.

Under these circumstances the plaintiffs claim that they are entitled to recover from the defendants the amount which they have paid to the Customs in respect of duties due on the defendants' goods. They make their claim as for money paid to the defendants' use on the principle stated in Leake on Contracts. The passage in question is quoted in the Exchequer Chamber by Cockburn C.J. in *Moule* v. *Garrett* (1), and is in these terms: "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay,

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(1) L. R. 7 Ex. 101, 104.

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so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount." This passage remains, with a slight verbal alteration, in the eighth edition of Leake on Contracts at p. 46.

The principle has been applied in a great variety of circumstances. Its application does not depend on privity of contract. Thus in *Moule* v. *Garrett* (1), which I have just cited, it was held that the original lessee who had been compelled to pay for breach of a repairing covenant was entitled to recover the amount he had so paid from a subsequent assignee of the lease, notwithstanding that there had been intermediate assignees. In that case the liability of the lessee depended on the terms of his covenant, but the breach of covenant was due to the default of the assignee, and the payment by the lessee under legal compulsion relieved the assignee of his liability.

That class of case was discussed by Vaughan Williams L.J. in *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society* (2), where *Moule* v. *Garrett* (1) was distinguished. The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff. The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal.

I need not refer to more than two of the numerous cases in which this principle has been applied. In *Pownal* v. *Ferrand* (3), an endorser of a bill had been compelled on default by the acceptor to make a payment on account to the holder. He sued the acceptor for the money so paid as money paid to his use. The money so paid was a part only

(1) L. R. 7 Ex. 101.

(2) [1899] 1 Q. B. 161.

(3) 6 B. & C. 439.

of the amount of the bill. He was held entitled to recover. Lord Tenterden C.J. said (1): "I am of opinion that he is entitled to recover upon the general principle, that one man, who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter." As an instance of money payable under a statute I may refer to *Dawson* v. *Linton* (2), where a tax was due from the landlord, but there was power to enforce payment by distress, if necessary, from the tenant. Abbott C.J. said: "It is clear that this tax must ultimately fall on the landlord, and that the plaintiff has paid his money in discharge of it; he has therefore a right to call upon the landlord to repay it to him."

These statements of the principle do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the Court simply under the circumstances of the case and on what the Court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract.

It is true that in the present case there was a contract of bailment between the plaintiffs and the defendants, but there is no suggestion that the obligation in question had ever been contemplated as between them or that they had ever thought about it. The Court cannot say what they would have agreed if they had considered the matter when the goods were warehoused. All the Court can say is what they ought as just and reasonable men to have decided as between themselves. The defendants would be unjustly benefited at the cost of the plaintiffs if the latter, who had received no extra consideration and made no express bargain, should be left out of pocket by having to discharge what was the defendants' debt.

I agree with the learned judge in holding that this principle applies to the present case. As I have explained, the duties were due from the importer. There is nothing in the machinery of the Customs Act which had removed this

(1) 6 B. & C. 443. (2) (1822) 5 B. & Ald. 521, 523.

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liability from him when the warehousemen paid the duties, as they were compelled to do under s. 85. The payment relieved the importer of his obligation. The plaintiffs were no doubt liable to pay the Customs, but, as between themselves and the defendants, the primary liability rested on the defendants. The liability of the plaintiffs as warehousemen was analogous to that of a surety. It was imposed in order to facilitate the collection of duties in a case like the present, where there might always be a question as to who stood in the position of importer. The defendants as actual importers have obtained the benefit of the payment made by the plaintiffs and they are thus discharged from the duties which otherwise would have been payable by them. It may also be noted that the goods which were stolen were the defendants' goods and the property remained in them after the theft. If the goods had been recovered, the defendants could have claimed them as their own and would have been free to apply them for home use without further payment of duty.

I think there is every reason in this case for applying the general principle which I have stated. In commercial dealings of this character it is difficult not to think of the case from the point of view of insurance; but I do not know whether these particular goods were insured by the defendants for their full arrived value as duty paid goods or were not, nor do I know whether the plaintiffs have insured their contingent liability under s. 85 as an ordinary trade risk. Either course would be in accordance with prudent commercial practice. I do not, however, lay emphasis on that aspect of the case.

I agree with the learned judge that the claim for the amount of the duties succeeds. I think that the judgment of learned judge should be affirmed and the appeal as a whole dismissed with costs. The 41*l.* 3*s.* 11*d.* which was paid into Court will be paid out.

ROMER L.J. I agree.

LORD WRIGHT M.R. Macnaghten J. has asked me to say

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that he also agrees with the judgment which I have just delivered and which he has had an opportunity of reading.

Appeal dismissed.

Solicitors for appellants: *Hair & Co.*

Solicitors for respondents: *Keene, Marsland, Bryden, Besant, Batham & Cork.*

W. I. C.

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July 14, 15, 16, 17, 20, 21, 22, 23; *Dec.* 7.

SYMES AND JAYWICK ASSOCIATED PROPERTIES, LIMITED *v.* ESSEX RIVERS CATCHMENT BOARD.

[1936. S. 360.]

Land drainage—Sea wall—Claim by owners of property on seaward side of wall to drain through it—Easement or quasi-easement—Powers of Catchment Board—Land Drainage Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *ss.* 34, 81.

No one can acquire a right to interfere with a sea wall so as to prevent it operating as intended by the Crown when it was built, and no grant from the Crown can be inferred from the existence of a drain letting sea water through the sea wall on to land behind the sea wall. If therefore a person makes a gap in or a hole under the sea wall for this purpose he commits an illegal act.

Attorney-General v. *Tomline* (1880) 14 Ch. D. 58 applied.

The mere fact that by the action of the sea the land on the seaward side of a sea wall has become higher than the land on its landward side gives the owner of property on the seaward side no right to drain through the sea wall.

Per Scott L.J.: In passing the Land Drainage Act, 1930, Parliament must be presumed to have intended to deal with any residual prerogative rights and duties, to entrust them to the various authorities mentioned in the Act, and to maintain the general constitutional position originally built up at common law and then taken over and developed by various statutes. It is an express or implied principle of the Act of 1930 that it is the duty of the relevant Board constituted under the Act to look to the attainment of its two main objects: (*a*) to control the flow of inland waters, and (*b*) to keep out sea water from farm lands. Where these lands lie below the level of high water, the sea defences can ensure no effective legal protection unless the Act contains this implication.

Decision of Atkinson J. reversed.

Appeal from a decision of Atkinson J.

The facts, which are stated in detail in the judgments, were, shortly, as follows: the plaintiffs, Francis Albert Victor Symes and Jaywick Associated Properties, Ld., alleged that by a conveyance dated June 24, 1931, Clacton Sporting Lakes, Ld. (hereinafter called "the Lakes Company"), the then owners in fee simple in possession of lands at St. Osyth, in the county of Essex, comprising (*a*) what was called "the Grassland section," which was on the northern or landward side of the sea wall there, and (*b*) "the Tendring section," consisting of land on the southern or seaward side of the sea wall, conveyed the Tendring section to a Mrs. Suffling in fee simple. That section, the plaintiffs alleged, was on a higher level than the Grassland section, and consequently that the surface-water accumulating on the Tendring section then and for many years previously had been discharged into a dyke on the Grassland section by means of a ditch on the seaward side of the sea wall and through a sluice or culvert in the sea wall, there being, as they alleged, no other means of discharging that surface-water; and they alleged that this was a watercourse, liberty, privilege, easement, right or advantage enjoyed with and was part and parcel of the Tendring section which, by virtue of s. 62 of the Law of Property Act, 1925, was included in the conveyance to Mrs. Suffling, and from her to the respective plaintiffs by subsequent conveyances dated October 30, 1931, December 2, 1931, and March 28, 1934. Alternatively, the plaintiffs said that the right so to discharge the surface water accumulating on the Tendring section was impliedly granted (*a*) as a continuous and apparent quasi-easement, or (*b*) as an easement necessary or reasonably necessary for the enjoyment of the Tendring section.

The plaintiffs alleged that in October, November and December, 1935, the defendants wrongfully stopped up the sluice or culvert whereby the surface-water accumulating on the Tendring section, being unable to run away, flooded and damaged the plaintiffs' premises; and in respect of this they claimed a declaration that the defendants were not entitled to stop up the sluice or culvert; an injunction; a mandatory order requiring the defendants to reopen the sluice or culvert; and damages.

By their defence the defendants said that as the Catchment Board constituted under the Land Drainage Act, 1930 (1),

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(1) Land Drainage Act, 1930, s. 34, sub-s. 1: "Every drainage board acting within its district shall have power—

(*a*) to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work:

(*b*) to improve any existing works, that is to say, to deepen, widen, straighten or otherwise improve any existing watercourse, or remove mill dams, weirs or other obstructions to watercourses, or raise, widen, and various Orders made thereunder for the catchment area draining to the Essex rivers, they had all the powers and duties in relation to the "main river"; that the sea wall was necessary for the protection of the "main river" and was a drainage work; that the dyke on the landward side of the sea wall was a drainage work in connection with the "main river"; all of which they were entitled to control. They denied that Tendring section was on higher ground than the Grassland section, or that any surface-water accumulating on the Tendring section, at any time before the erection of the buildings on that section, hereinafter mentioned, was discharged into the dyke on the Grassland section, and that any sluice or culvert existed or ran through the sea wall before a box sluice was inserted in February, 1931. They further denied that the dyke on the landward side of the sea wall was ever intended for drainage purposes. Before the erection of a large number of buildings on the Tendring section in the latter part of 1931 and onwards, the defendants said that no means of discharging surface or sea water on the Tendring section existed or was required; and after the erection of those buildings no system of drainage was provided by the plaintiffs. The defendants denied that the plaintiffs acquired anything in the nature of an easement or quasi-easement to discharge water through the sluice or culvert. The defendants further

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or otherwise improve any existing drainage work:

(*c*) to construct new works, that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act not hereinbefore referred to, required for the drainage of the area comprised within their district:

Provided that a Catchment Board shall not, by virtue only of this subsection, be taken to be authorised to do any work otherwise than in relation to the main river."

Sect. 81: "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:

. . . .

'Drainage' . . . . includes defence against water . . . .

. . . .

'Main river' includes any structure or appliance for controlling or regulating the flow of water in or out of the channel, and situate therein or in any part of the banks thereof other than any such structure or appliance which is vested in or controlled by an internal drainage board."

said that one Stedman, as agent for the Lakes Company and/or agent for Mrs. Suffling, made a breach in the sea wall for the purpose of draining water into the dyke; that he was required by the defendants to make good the sea wall; that when a box sluice was inserted by Stedman, the defendants required him to put in a penstock by which the sluice could be closed. The defendants admitted that in December, 1935, as they contended they were entitled to do by virtue of their powers, rights and duties under the Land Drainage Act, 1930, they remedied the box sluice and caused the breach in the sea wall to be permanently closed, inasmuch as the water that was passing into the dyke from the Tendring section, consisting partly of sea water and partly of foul water, was polluting the dyke and the agricultural land on that side.

ATKINSON J. held that the defendants approved of the sluice being put in by Stedman; that they contemplated that sea water would sometimes pass from the seaward side of the sea wall into the dyke on the landward side; that the plaintiffs had acquired a right in the nature of a continuous and apparent quasi-easement to send surface-water, including sea water, through the sluice into the dyke and further that the plaintiffs as the owners of the higher land were entitled to drain its surface-water on to the lower. The damage in respect of which the plaintiffs sued was the result of the blocking up of the opening in the sea wall. He could not accept the defendants' contention that all that they did was done in the maintenance of an existing drainage work, and he held that they could not justify their acts under the Land Drainage Act, 1930. Moreover the defendants had acted unreasonably, harshly and unnecessarily from the point of view of safety and for the protection of the sea wall. He accordingly held that the plaintiffs were entitled to the declarations asked for.

The defendants appealed.

Beyfus K.C. and *Geoffrey Hutchinson* for the appellants. The Crown has the duty to prevent an encroachment of the

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sea upon the land. That duty, it is true, is one of imperfect obligation, and a subject has no remedy if the Crown fails to carry it out; but when the Crown has, for the protection of the land, erected a sea wall, no one can do, what even the Crown cannot legally do, make a breach therein. That being so, it is impossible for any one to acquire a right to discharge sea water through the sea wall, inasmuch as such a right would stultify the very object for which the sea wall was erected. Furthermore, unlawfully to cut through a sea wall whereby land may be flooded or damaged is a serious offence: Malicious Damage Act, 1861, s. 30. Moreover, it was decided in *Attorney-General* v. *Tomline* (1) that no subject is entitled to destroy a natural barrier against the sea whereby injury may be caused to a neighbouring landowner, a decision which was followed by Eve J. in *Canvey Island Commissioners* v. *Preedy.* (2) Further, the right of the owner of the dominant tenement to drain on to the servient tenement has no application where, as in this case, the higher land is outside a sea wall. The plaintiffs' claim to prevent the defendants repairing the breach in the sea wall is based upon a claim to drain sea water through the sea wall either from a natural right to do so or from the acquisition of a quasi-easement. Such a claim, if possible at all, could only be substantiated if the plaintiffs could show that the right was reasonably necessary for the enjoyment of their property: see per Lord Parker in *Pwllbach Colliery Co.* v. *Woodman* (3); and they failed to show this. It was not a necessity for the plaintiffs to drain their land through the sea wall; it was a mere convenience, and a convenience, however economical, does not show a necessity: *O'Cedar, Ld.* v. *Slough Trading Co.* (4) The fact that for some time the Tendring section had drained through the sea wall cannot entitle it as of right to continue to do so. The judge was wrong in holding that the easement, if it could be said that there was one, had not been increased; he was likewise wrong in holding that the defendants were not entitled to take the steps they did to maintain the sea wall

(1) 14 Ch. D. 58.
(2) [1922] 1 Ch. 179.
(3) [1915] A. C. 634, 646.
(4) [1927] 2 K. B. 123.

in a condition which would prevent sea water and foul water getting into the dyke and polluting it. In any view the discretion of a public body in the bona fide exercise of its statutory powers ought not to be scrutinized too narrowly.

Montgomery K.C. and *G. O. Slade* for the respondents. When Mrs. Suffling acquired the Tendring section there was in existence a culvert carrying water from that section to the dyke on the Grassland section. There was thus in evidence an apparent easement which passed to the respondents entitling them to drain through the culvert: see *Watts* v. *Kelson* (1) and *International Tea Stores Co.* v. *Hobbs.* (2) The culvert in no way affected the security of the sea wall, as was found by Atkinson J.; indeed the stability of a sea wall may be promoted by the presence of a culvert through it. The appellants can only justify their act, if at all, under the Land Drainage Act, 1930; but that Act only entitles them to go on to a person's land in order to maintain an existing drainage work. The doctrine as to the right of drainage from higher land to lower is applicable although the land from which the water flows has been made higher by artificial means. In *Gibbons* v. *Lenfestey* (3) Lord Dunedin said that where two contiguous fields belonging to different owners are on a different level the owner of the higher land has a natural right of drainage to the lower, and that even where the amount of water coming from the higher is increased by drainage works thereon the lower land is bound to take this increased flow. The appellants are not empowered by the Act of 1930 to create a nuisance on the respondents' land even though their object is to achieve a legitimate result. Their powers under the Act must be used reasonably, and if, as the judge has found, the appellants acted unreasonably and thereby the respondents were damnified, the latter have a good cause of action.

Beyfus K.C. in reply. It is said that the defendants behaved unreasonably. For that suggestion there is no foundation.

(1) (1871) L. R. 6 Ch. 166.
(2) [1903] 2 Ch. 165.
(3) (1915) 84 L. J. (P. C.) 158.

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In view of the polluting water passing through the culvert it was essential that steps should be taken to prevent this; indeed it was the defendants' obvious duty to do this.

Cur. adv. vult.

Dec. 7. The following judgments were read:—

Greer L.J. This is an appeal from the judgment of Atkinson J. in an action brought by Mr. Francis Albert Victor Symes and Jaywick Associated Properties, Ld., against the Essex Rivers Catchment Board, whereby it was declared that the defendant Board was not entitled to stop up a sluice or culvert in the sea wall abutting upon the foreshore at St. Osyth in the county of Essex, and that the defendants, by closing up the sluice or culvert in exercise or purported exercise of their statutory powers under the Land Drainage Act, 1930, had deprived the plaintiffs of legal rights which otherwise they would have enjoyed and that the plaintiffs had suffered damage from the said closing up of the said sluice or culvert, and whereby the defendants were restrained by injunction from stopping up or obstructing the said sluice or culvert, and the defendants were ordered to replace the sluice or culvert and reopen the same within fourteen days from the date of the judgment, and it was directed that judgment should be entered for such amount of damages as should be found due upon an inquiry by one of the Official Referees. The learned judge stayed execution pending this appeal on the defendants' undertaking in the meantime to pump away the water on the seaward side of the sea wall in question.

The facts relevant to the only point which it seems to me necessary to decide in this case are as follows: there is on the coast of Essex in the neighbourhood of St. Osyth an ancient sea wall the age of which was not proved by either party; but it must be taken that the sea wall was erected either by the Crown direct or by the Commissioners of Sewers in whom for a long time were vested the powers of the Crown to create and keep in order sea walls, in order to prevent the incursion of the sea into the land behind the sea wall. The plaintiffs alleged that in some way or other they had acquired a right to drain under the sea wall, at a place called Tendring in the said county, the sea water that from time to time accumulated on the seaward side of the sea wall. The locus in quo was a horseshoe-shaped piece of land formed by an inward curve in the sea wall in the neighbourhood of St. Osyth, which is more particularly described on the plan used at the trial. The claim of the two plaintiffs to the rights to which they alleged they were entitled arose in the manner following. They claimed as owners of plots of land on the seaward side of the sea wall which they had bought from a daughter of a Mr. Stedman, who had acquired her title to the land as follows. Two speculators named Stedman and Bond had bought the land on the seaward side of the sea wall, together with the land behind the sea wall, between that and a counter-wall further inland, hereinafter referred to as the caterpillar-shaped land. They formed a company and conveyed the land to the company. All the shares in the company belonged to Stedman and Bond. Bond became insane, and Stedman bought his shares at the bargain price of 500*l.* and became the sole shareholder. He then got the company to convey the land on the seaward side of the sea wall to one of his daughters, who held the land as trustee for Stedman or his company, and the land on the landward side to another daughter, who also held it as trustee for him or his company.

The above facts are stated with more detail later in this judgment. It was alleged that the effect of the conveyance of the seaward land was to vest in the purchaser of that land the right to a quasi-easement to drain the sea water under the sea wall through a wooden sluice which had taken the place of an old brick drain. All that was known about the brick drain was that in the year 1900 a witness called at the trial, who was in 1900 a mere boy, had been playing with pieces of wood in the neighbourhood of the culvert and he found that his pieces of wood were carried towards the caterpillar-shaped land on the landward side of the sea wall against a grid, but what was the height of the water at that time or what was the level or condition of the bottom of the culvert or whether the water was sea water or fresh flood water was not proved. In my judgment it was established with sufficient probability by a witness named Latham, called for the defendants, who knew this district very well and had inspected the sea wall in 1922, that the land between the sea and the sea wall and beyond it was at one time level, and that culverts such as the one in question existed in many places for the purpose of what is called a relief sewer, that is to say, for the purpose of enabling flood water which accumulated in the caterpillar-shaped land to flow back again on to the seaward land and so to the sea. The learned judge did not accept Mr. Latham's evidence. I think he ought to have done so, as it was the only evidence on the subject, and there was no reason to doubt his veracity or competence to give the evidence he did give.

Before the year 1931 the sea frequently flowed as far as the sea wall, and the bulk of the sea water drained back into the sea through the sand and shingle, but part of it remained in a ditch which had been made at some time or other on the seaward side of the sea wall, and this only disappeared by evaporation in the summer. There was no evidence up to the year 1931, except that of the boy above referred to, that any sea water had been escaping through the culvert to the landward side of the sea wall.

A farm behind the sea wall and the counter-wall was known as the Cockett Wick Farm. On June 24, 1931, a company called the Clacton Sporting Lake Company, Ld., was formed to purchase the seaward land and the land between the sea wall and the counter-wall.

In October, 1931, the defendant Board came into existence, and at a later date became the Drainage Board for the whole area. Some time in October, 1931, while the old Board was still in control, it was suggested by Stedman that the company should be permitted to substitute a wooden sluice for the original culvert. It had been found that for two and a half feet on each side of the culvert in the wall the brickwork of the culvert had been removed, and the space on the seaward side had been filled in with clay and other material and the subsequent growth of herbage, which prevented any efflux of water either way to any amount that mattered. The sluice was inspected on behalf of the Catchment Board when they succeeded the old Board, and Stedman agreed that the maintenance of the sluice should only be allowed upon the terms that a penstock must be put in to control the sea water. The effect of the penstock, if it had been kept in order, would have been that the Board could at any time that they chose have insisted on its being kept closed, and so have prevented any flow of sea water into the sluice. The penstock was duly put in by Stedman.

Thereafter, on October 30, Mrs. Suffling, to whom the part known as Tendring on the seaward side of the wall had been conveyed, conveyed to the plaintiff Symes a site which was one of a number of plots which had been planned by Stedman for the building of bungalows on the Tendring area. Between Mr. Symes' property and the sea wall there were other plots which were subsequently conveyed to other purchasers.

In March, 1934, the plaintiff company acquired a club-house building in the centre of the Tendring area further removed than Mr. Symes' property from the sea wall, and having between it and the sea wall several other plots subsequently sold to other purchasers. Later, a company was formed, called the Jaywick Freeholders Association, to represent the various purchasers. Between 1931 and 1935 a very large number of bungalows were put upon the Tendring area by purchasers from Mrs. Suffling. The land comprised in the Tendring area was entirely unsuited for a building estate, inasmuch as on many occasions sea water used to come over on to the property and flood it for a considerable time. Stedman, or his company, constructed a roadway on the top of the shingle on the seaward side of the Tendring area. This had the effect of reducing the number of occasions on which the sea would get into the Tendring area, but it did not prevent it on all occasions, and on September 15, 1935, a very high tide poured sea water over into the area where the plaintiffs' and other purchasers' houses were. For a considerable time the defendants' predecessors did not find it necessary to use a penstock because the sea water used to come in on the far side of the sea wall, through a sluice known as Bond's Sluice, which was out of repair, and the sea water, if any, which flowed from the horseshoe area did not make any material difference in the amount of sea water behind the sea wall. But in 1935 Bond's Sluice, through which the water from the caterpillar area used to flow to the main river, which had been broken down for a long time, was repaired, and thereafter the sea water was kept out of the caterpillar area except to the extent that it could get into that area through the wooden sluice. The defendants, with the consent of Stedman, closed the penstock in order to control the flow of the sea water through the wooden sluice, but it was found a day or two afterwards that the penstock had been destroyed and rendered useless. Thereupon, in order to prevent the sea water flowing beyond the sea wall, the defendants filled up the end of the sluice so as to make it watertight. Somebody or other, probably the servants or agents of Stedman, removed the clay and other material with which the hole had been filled up, and the servants of the Board replaced it. It was taken down again by the agents of Stedman and, in addition to that, an actual breach was made in the sea wall by cutting it down so that the water could flow through the gap. This was afterwards repaired by the defendants, and the plaintiffs then brought this action.

I should like to add that I have summarized to the best of my ability the effect of the evidence, but I have had an opportunity of reading the written judgment of Scott L.J., who has gone into every detail with regard to these matters. I agree entirely with what he says in his written judgment.

In order to succeed, the plaintiffs had to prove in some way or other that they had acquired a right to drain sea water through the culvert under the sea wall. In my judgment they failed to establish any such right, and on that ground their action should have been dismissed.

It is clear from *Attorney-General* v. *Tomline* (1) and some observations in the House of Lords in *Attorney-General of Southern Nigeria* v. *John Holt & Co.* (*Liverpool*) (2) that sea walls owe their origin to the prerogative of the Crown to protect the realm against the incursion of sea water, just as a wall of a fort is erected to prevent the attack of an enemy. In the *Nigeria* case (2) Lord Shaw says (3) this: "In truth and substance what was done was to protect the land, to guard against the invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it is recognized by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim, as was done, that licence would have been in entire accord not only with the right of the subject but with this duty of the Crown. This principle is in accord with the law laid down in *Attorney-General* v. *Tomline* (1), and principally with the opinions of Fry J. at the trial and Cotton L.J. in the Court of Appeal."

The decision of the Court of Appeal in *Attorney-General* v. *Tomline* (1) appears to me to show conclusively that nobody can acquire any right to interfere with a sea wall so as to prevent it operating as intended by the Crown when it was built. Whether a gap is made in the sea wall or a hole is made under the sea wall with the object of letting sea water into the lands which lie behind the sea wall, those who make such a gap or hole are committing an illegal act; they can acquire no right to let sea water into the lands behind the sea wall, such a right being absolutely inconsistent with the object of the Crown in causing the sea wall to be built. No grant from the Crown can be inferred from the existence of a drain such as the one in the present case of a right to let the sea water through such a drain on to the land behind the sea wall. The object of the existence of sea walls is to be compared with the object of defences against an enemy of the Crown. It would be absurd to suppose that the owner of a fortress having built his defences against the enemy should grant to any one a right to interfere with those defences in such a manner as to enable a hostile force to enter upon his fortress. It is equally impossible to assume that the Crown would grant any right to any subject to interfere with the defences raised by the Crown against the incursions of sea water.

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(1) 14 Ch. D. 58.

(2) [1915] A. C. 599.

(3) Ibid. 620.

It seems to me, therefore, that, in the absence of any proof of licence by the Crown to the owner of the land to drain sea water through the sea wall, even if the Crown could grant such a licence, the plaintiffs failed to prove their case and the action necessarily fails. If they had no rights they could not complain of anything that was done by the defendant Board. In this kind of claim, as well as in every other claim, the plaintiff cannot succeed without proving his case, and it is essential to the success of their action that the plaintiffs should have proved that they had the rights which they claim. The mere fact that by the action of the sea the land on the seaward side of the sea wall had become higher land than the land on the landward side of the wall could not possibly give them any right to drain their sea water through the wall. It seems to me impossible to suppose that the culvert through the wall could have been meant by those who built the wall many years ago—probably the Commissioners of Sewers—for the purpose of allowing sea water to flow into the land beyond the wall. It seems probable that, as Mr. Latham thought, it was put in at some time or other for the purpose of what he called a relief sewer to allow flood water to run back from behind the wall to the land in front of the wall, and so to the sea. But be this as it may, it seems to me quite clear that the plaintiffs failed in limine in that they did not prove that they had ever acquired the right which they alleged the defendant Board had interfered with.

Many other questions were discussed in the case, but in my judgment it is quite unnecessary to express any opinion with regard to them.

The appeal will be allowed with costs, and judgment entered for the defendants with costs.

SCOTT L.J. In this case the Essex Rivers Catchment Board appeal from a judgment of Atkinson J. in an action in which they were defendants, and Mr. Symes and the Jaywick Associated Properties, Ld., were plaintiffs.

The broad question in the case is whether the plaintiffs and other owners and occupiers of land and buildings in a certain area known as Tendring, which lies outside the ancient sea wall built as a defence against sea water, are entitled to drain surface-water, including sea water, through the sea wall on to the farm lands now lying at a lower level inside the sea wall.

There are subsidiary disputes arising out of the discovery in 1931 in the north-west angle of the sea wall which encloses Tendring on the west, north and east, of an old brick sluice running through the wall, or, rather, of what remained of it, for, when discovered, it was seen that two feet of each end had been totally removed at some distant past date. Various disputes arose during 1931 to 1935 inclusive, directly or indirectly, out of or about this sluice, and certain issues of a subordinate kind were discussed and decided at the trial about it; but they do not affect the main questions of the appeal, and I leave this sluice and its story until a later place in my judgment.

In my view, even if the facts of the case were what the learned judge has found them to be, his judgment would still be wrong in law on the broad ground that even on his hypothesis of fact the plaintiffs would have failed to establish any cause of action. But the entire judgment rests on one particular inference of fact, and that inference is, in my opinion, erroneous. It is therefore proper to consider that part of the case first. It is also desirable from the public point of view to correct that inference, as it is one capable of general application on a large part of our coasts, and if we merely reversed the judgment on its legal side we should leave what I regard as a serious misconception upon the subject of coastal formation and the effect of tidal action on record as a considered judicial conclusion after an elaborate trial.

For these reasons I think it essential to consider the evidence bearing on the judge's main inference closely.

Six years ago there was on the Essex coast about two miles west of Clacton-on-Sea a tract of land, practically seashore, where local farmers used to shoot the wild duck which frequented its salt pools. It was just a section of the long ribbon of land, lying above the foreshore and outside the sea walls, of what are called " saltings " in that part of Essex. The main line of shore there runs roughly east and west. This section lay within the jaws of a wide bay, or recess, in the ancient sea wall which protected the farm lands behind it from the sea and the incursion of sea water. The recess was about 600 yards wide from east to west and 250 yards deep from north to south, and faced south towards the sea.

Between 1930 and January, 1936, when the writ in this action was issued, this tract was developed—if I may use a word which has acquired a sinister meaning for those who want to preserve the beauty of England—as a speculation, into a sort of bungalow town, composed of a gridiron of streets and containing some 800 separate dwellings, intended mainly for summer occupation, the land being built over at a density rate of over eighty houses to the acre. It was literally without any drainage whatever, and no water supply except a single pipe bringing fresh water to one tap. It consists of a promenade road built on the top of the beach or ridge of shingle and sand thrown up on to the edge of the salting by wave action, and a series of streets, nearly at right-angles to the promenade, running northwards to the sea wall. It must be utterly out of place and a dreadful eyesore on that flat, open coast.

[His Lordship referred to some of the correspondence and continued :] The appeal raises various questions of general importance in the national interest upon the ancient law of the land as to sea walls and the protection of our farm lands from sea water, and the claims of right put forward in this action on behalf of a bungaloid growth like Tendring to rid itself of its surface water, whether fresh or salt, clean or foul, by sending it inland through the sea wall on to the farm lands beyond, instead of making a sewer out to sea (which it was stated at the trial could have been done quite easily at a small cost) seem strangely out of keeping with the common law view of the function of sea walls, and it seems to me contrary to the public policy which underlies our law about sea defences that the Court should seem in any way to stretch the law in favour of those who are acting contrary to the public interest both by setting up such an insanitary town as has been constructed in the present case and by injuring the amenity of a beautiful sea coast. The owners of houses or other property there are, of course, entitled to their pound of legal flesh, but they are entitled to no more; and I have come to the conclusion that the learned judge's sympathy for individual householders has caused him to stretch legal rights in the plaintiffs' favour and, indeed, to invent rights for them which have no justification in either law or public policy.

The plaintiffs are two owners of plots and buildings in the middle of Tendring, neither property being contiguous to the sea wall. The plaintiff Symes owns two houses, Nos. 30 and 32 Essex Avenue, and lives in one. The plaintiff company is the owner of plots at Brooklands Gardens known as the Clubhouse, the Café and Brooklands Green.

The way in which the plaintiffs had derived title is sufficiently set out in the statement of claim, but it should be borne in mind that a Mr. Stedman was owner of all, or almost all, the shares in the Lakes Company; that the Mrs. Suffling mentioned in para. 2 of the statement of claim was his daughter, and that she took her conveyance as trustee for her father. Subsequently he, through her, sold off plots to purchasers, his company as vendors receiving a total price of 40,000*l*., or thereabouts.

The landward limit of saltings is the sea wall; their seaward limit is at or just above the foreshore, the upper boundary of which is, in England, the mean high water mark of ordinary tides—not the mean high water of ordinary spring tides, as in Scotland, for spring tides are excluded in our English practice from the computation of the annual average. This upper limit of the foreshore is shown graphically and in words on all large scale Ordnance maps. It coincides with the legal meaning of foreshore in England: *Attorney-General* v. *Chambers* (1) and *Mellor* v. *Walmesley* (2); and see Coulson on Waters and Land Drainage (5th ed.), at p. 21. The band of saltings on the Essex coast is shown on the six-inch Ordnance map attached to the official scheme under the Land Drainage Act, 1930, for the new Maldon, Wivenhoe and Clacton Internal Drainage Board, set out in the Statutory Order No. 308 of 1935, and is there coloured purple, as distinct from the area constituting the drainage district, which is coloured pink. Essex saltings are nearly always flat, or nearly flat, apart from ridges or beaches of sand and shingle parallel to the sea heaped up on them by wave and wind action. They have common characteristics through some ninety miles of coast line, being composed of a layer of flat clay, with a cover of salt-loving plants and grasses growing on the sand ridges and to a less degree on the drier parts of the clay. The clay is not of the same kind as ordinary land clay. The level of the top of the flat bed of clay is two or three feet higher than the level of the grass lands on the land side of the sea wall, usually called marshlands, which are also flat, or nearly so; but the sea walls when properly maintained keep all salt water out and preserve the sweetness of the water in the dykes in the marshland—a vital requirement for the cattle which feed there, as the presence of salt in drinking water is, and was proved at the trial to be, highly dangerous to livestock.

In the case of the Tendring section of salting the level of the clay is 8·5 feet Ordnance datum, which is 2 feet above the level of the marshland. There is there, close against the length of the sea wall which runs east and west, at its south foot, a ditch the origin of which is not known. It is

(1) (1854) 4 De G. M. & G. 206.

(2) [1905] 2 Ch. 164.

about two feet deep, and the bottom of it is therefore about level with the surface of the farm lands on the north side of the sea wall. There is there a dyke of fresh water, part of the system of dykes draining the farm lands into the main river which runs out to the sea at Bond's Sluice some distance away to the west.

The saltings, including Tendring, are liable to flooding from the sea whenever spring tides rise above the protecting beach or ridge, especially when the waves are big, and it is this sea water which the plaintiffs claim the right to drain off by sending it, whether pure or mixed with rain water, through the sea wall into the fresh water dyke running through the farm lands at the foot of the sea wall on the landward side. The plaintiffs claim the right, through predecessors in title, as estate owners of their plots on three alternative grounds of either (*a*) an easement or other right acquired under s. 62 of the Law of Property Act, 1925, or (*b*) an implied grant of an easement or quasi-easement openly used when the land outside and the land inside the sea wall were both in the same ownership, or (*c*) a natural right incident to the ownership of the higher land. The learned judge acceded to their claim and gave them a declaration accordingly, with an inquiry as to damages, and also granted injunctions both negative and mandatory for the purpose of compelling the defendants to allow and to carry out certain works of construction in order to allow the sea water from the plaintiffs' and all the other plots of land in Tendring to flow through the sea wall on to the farm lands behind it.

The statement of claim carefully avoids saying that the water which the plaintiffs claimed the right to discharge through the sea wall was in part sea water, but their evidence made it clear that it was. This being so, the plaintiffs' action fails in limine. I do not think that a right to drain salt water through a sea wall on to the farm lands behind it is known to our law; such an act would be contrary to public policy at common law, and I think is expressly or impliedly forbidden by our statute law. Nor in my view can such a right have arisen by reason of any of the facts found by the learned

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judge, or have been acquired by any of the means submitted by the plaintiffs and accepted by him in his judgment. But as I think his fundamental findings of fact were also misconceived and that for this reason too his judgment ought to be set aside, I propose now to consider the evidence and to state what I think it proves. [His Lordship then dealt with this evidence and continued:] The learned judge treats Mr. Latham as saying that after the sea wall was built the marshland through drying and shrinking actually fell—that is, subsided—to a lower level, whilst the land outside the sea wall being still subject to tidal flooding remained wet and therefore did not shrink or fall, but "kept the level up." Indeed, he goes further and, as it seems to me, without any justification treats Mr. Latham as saying that the bottom of the dykes in the marshland had fallen with, and to the same extent as, the surface. The learned judge easily refutes this supposition of an actual fall by pointing out that the dykes were always full of water and could not have fallen through getting dry. Having thus laughed Mr. Latham's supposed theory out of Court, the learned judge ignores alluvial deposit on the saltings, and thus feels free to conclude that "in the absence of proof to the contrary, he is bound to assume that the natural levels of the land are as we find them"; that is, that the saltings always were, from a time before the building of the sea walls, two feet higher than the marshlands. This is the basic assumption of fact underlying the whole judgment. From it are deduced the plaintiffs' natural rights to drain on to the lower land. If it is wrong, the foundation of the judgment disappears.

In my view it is wrong. Mr. Latham did not say anything like what the judge thus put on him. What he says is that the marshes were "won and warped from the sea." By that he means that what is now marshland was once either open foreshore subject to the ebb and flow of ordinary tides, or land just above the foreshore, flooded by spring tides twice a month; that after the walls were built, the land inside was no longer covered by the tide and therefore was able to dry out and "settle"—by which he means "consolidate"—

"over centuries." There is not a word to indicate that he thought the two feet disparity of level was ever caused by the marshlands falling. On the contrary, the explanation of the present difference of level on the two sides of the sea wall is, according to him, that the surface of the sea side was raised by alluvial deposit in the course of the centuries since the walls were built; and I have no doubt whatsoever that this is the correct inference. When the tides flowed over it, the water would at a certain stage of tide drop some of the solid matter in suspension—the essential process of coastal accretion everywhere. The meaning of Mr. Latham's evidence seems quite plain to me. The marshland was no longer, after the building of the wall, wetted by the tide flowing over it; it was left dry in that sense, and able to settle or consolidate; but the land outside the wall remained "alluvial"; that is, subject to alluvial deposit, because it continued to be submerged by any tide which rose above its existing level. The learned judge seems to have missed altogether the word "alluvial," or at any rate not to have grasped its significance. The whole process of accretion on coasts like that of Essex causing an increase of the land upwards and outwards is due to the deposit of solid matter held in suspension by the tidal current; and this alluvial deposition always raises the surface of the land in course of time, often quite substantially; and where the solids in suspension are argillaceous, their deposit of course produces a bed of clay. On this part of the Essex coast this seems a natural origin for the saltings clay of which the witness spoke. I cannot doubt the inference that it was this process of deposit, going on ever since the date when the sea walls were built, which gradually raised the level of the saltings all along this shore to its present level some two feet above the old level of the land north of the wall—the level at which, through the cessation of alluvial deposit when the wall was built, the marshlands have ever since remained. This interpretation of the evidence given by the witness tallies precisely with the story which to me seems plainly unfolded by the Ordnance maps. My reasons for saying this are these: (I.) ex hypothesi these walls were built to keep the sea out and allow the land inside to become pasture for cattle; of this purpose there can be no historical doubt; (2.) their object being to "win and warp land from the sea," they were built as near to the then foreshore as possible; (3.) it may therefore be presumed (*a*) that what is now salting was mostly foreshore when the walls were being built; (*b*) that in cases where a sea wall to-day bends landward in a bight like that at Tendring, there was at the time its construction was undertaken a bay or creek of the sea running into the land; for the fair inference from the maps is that these walls followed the line of the foreshore closely in order to enclose as much land as possible.

In the result, I regard it as conclusively established by the evidence of Mr. Latham and of the Ordnance maps, that when the sea wall was being built the level of the land at Tendring outside the sea wall was certainly not higher, and all or much of it may well have been lower than the land inside the sea wall. I cannot see any real evidence to support the judge's inference that "the natural level" of the land outside the wall was always what it is to-day and, therefore, higher than the sea wall. But this was, as I have already said, the most important foundation of fact upon which he rested his judgment. The learned judge accepted the evidence of the witnesses that the flooding of Tendring by spring tides "was not a rarity but something which was not uncommon." It is, therefore, not necessary to discuss the evidence; it is sufficient to recall Mr. Latham's evidence to the effect that the "beach" on the saltings is of recent growth, and that, before the 1874 Ordnance Survey, there was little of it there to serve as an obstacle to the sea. The increase in size and height of the "beach" since then, and the making of Brooklands Road, no doubt now keep out a good deal of the sea water which would otherwise have come in; but the evidence and the photographs show that large quantities still get over from time to time and flood the flat land in the northern half of Tendring up to the sea wall.

I have now dealt with the facts relevant to the main issue, but I must deal shortly with the facts affecting the subordinate issues to which I referred at the outset. [His Lordship stated these facts and continued :] The learned judge did not think this evidence sufficient to displace the evidence of the labourer, Wringe, and found as a fact that there was when Wringe as a boy played there some free passage through the wall.

As Mr. Latham's evidence was negative, and Wringe's was positive, I do not think we ought to disagree with this finding by the judge : but I cannot agree with his next step. From the discovery of the truncated culvert, and Wringe's evidence, he inferred that both the original purpose and the subsequent use of the culvert was to drain the salt water from the salting into the marshland. This step is a jump which seems to me impossible in law and improbable in fact. It is impossible in law because it offends against the maxim "omnia praesumuntur rite esse acta." The authority whose duty it was to take care of the wall and to keep the sea out must be presumed to have put a penstock in to prevent any flow in the wrong direction—at least if it knew about it. If the making of the culvert was an unauthorized breach in the sea wall, done without the knowledge of the authority, no private rights can be born of such an act, which would have been an offence against the law. It is improbable in fact that the culvert should have been either made or used to let sea water through, for obvious reasons. [His Lordship considered the evidence as to the culvert and continued :] I therefore think that our only safe foundation of fact in regard to this culvert is to assume that it was constructed in such a way as, with the assistance of a penstock, completely to prevent the passage of water from the sea side to the land side.

The subsequent history of the culvert may be summed up, so far as relevant to our decision, by saying that there was a series of disputes as to the right of the owners of property at Tendring to drain all surplus water, salt or fresh, by it through the sea wall into the fresh-water dyke on the land side. The learned judge went into the question whether the old internal Drainage Board in 1931, or the defendant Board, which, pursuant to s. 6, sub-s. 1, of the Act of 1930, so far as concerned the sea wall and the farm land and dykes in the neighbourhood of Tendring took over all the old Board's functions, at any later date consented to or acquiesced in owners of property in Tendring thus draining their surplus water, salt or fresh, through the sea wall on to the farm lands beyond. He held that the old Board, in the spring of 1931, agreed to the box sluice already mentioned being left in the sea wall. I do not think there is enough evidence to establish any real consent; the evidence does not amount to anything more than the then moribund board not taking action. As Bond's Sluice was out of order, the tidal stream flowing up from there could pass through the counter wall into the dykes on the north side of the Tendring sea wall; there was no urgency and they may well have thought the dispute about the box sluice might stand over.

In the autumn of 1931, the defendant Board, having then come into existence, took up the question of the box sluice and insisted upon a proper penstock being inserted, which would prevent any passage of water through the wall unless it was deliberately opened. The letters at the time show the position: Mr. Stedman agreeing to the Board's requirements about the penstock.

In regard to this event, the learned judge held that the sluice thereby became "an existing drainage work for the purpose of draining all the land on the sea-side of the sea wall, namely, the Tendring section." With this finding and with the judge's legal conclusions from it, I will deal later; but I see no evidence of a consent by the defendant Board to the penstock being opened without the Board's permission. There was a dispute again in January, 1934, when the wall was cut by Mr. Stedman, and flood water let out from Tendring; but on the 30th of that month Mr. Stedman wrote promising that the wall would never again be cut.

Nothing material took place thereafter until 1935. What then happened is described by the learned judge in detail; it all appears in the correspondence which passed at the time and may be summarized shortly. Sea water flooded

Tendring in September, 1935, and brought the dispute to a head. Those acting on behalf of the owners of property in Tendring claimed the right to drain sea water, or any other water, clean or foul, through the wall into the fresh-water dykes in the marshland. The defendants removed the box sluice and penstock. A Mr. Hobbs cut through the wall and drained all the water off. Then the defendants restored the wall again.

The whole of the correspondence through this autumn shows the two sides at arms' length, and the plaintiffs' side taking violent measures to enforce their alleged rights; but it does not seem to me otherwise relevant. The learned judge passed very severe strictures on the defendants' letter of January 10, 1936, to the Ministry of Agriculture. I am not quite sure that his strictures were well-founded, as he seems to have ignored the two facts that the old Board made no definite or formal agreement, and that in the autumn of 1931 the defendant Board insisted upon having a proper penstock inserted. But even if the censure was fully deserved, it does not affect the rights of the parties.

Even if there were an express consent by one or other Board to allow the sea wall to be breached in order to admit the flow of water through it from the seaward side to the land side, that consent would in my view be inoperative to convey any rights. In my opinion, neither at common law nor by any existing statute can an owner of land outside the sea wall possess a right to send sea water through the sea wall on to the land lying within the sea wall, or to make any breach in a sea wall which will expose the land on the landward side to the risk of such an event happening. According to the ancient law of the land, sea defences were constructed for the purpose of keeping the sea out and not for letting it in. The Crown had a duty, no doubt of imperfect obligation in that the subject had no means of enforcing it, to maintain the sea defences of the country; and where such defences exist I cannot see how a person becoming entitled to land outside the sea wall could ever acquire the right to drain sea water through the sea wall on to the land within, or to do anything to the sea wall likely to have that result.

In so far as the King's powers and duties were delegated to statutory bodies under the Statute of Sewers of Henry VIII.'s reign and subsequent statutes, the legal presumption must be that the King's prerogative, if any, and his concurrent duties of imperfect obligation, passed from him to the statutory bodies so created, modified, no doubt, by the express terms of the particular statutes creating those bodies.

When in 1930 the whole series of statutes dealing with land drainage—what used to be called "sewers"—and sea defences, were repealed by the general Act of that year, I think Parliament must be presumed to have intended to deal with any residual prerogative rights and duties, and to entrust the whole of those two subjects to the various authorities mentioned in the Act, and also to maintain the general constitutional position in regard to sea defences which had been built up originally at common law and then taken over and developed by a series of statutes: see the opinions of Lords Dunedin and Atkinson in *Attorney-General* v. *De Keyser's Royal Hotel.* (1) Thus it appears to me to be an express or implied principle of the Land Drainage Act, 1930, that it is the duty of the relevant Board, constituted under the Act, to look to the attainment of its two main objects: (1.) to control the flow of inland waters; (2.) to keep out sea water from our farm lands. The Act also, I think, impliedly recognizes and enshrines the old common law principle of public policy that our farm lands ought to be protected from the sea. Where they lie below the level of high water, whether at ordinary or only at spring tides, the sea defences of the country can ensure no effective legal protection unless the Act contains at least this implication. If this view be right, I cannot see how any person could acquire a substantive right to do that which would defeat the purpose of Parliament in passing the Act; nor can I see how an Authority established under the Act could give a binding consent contrary to the purpose of the Act. Such a consent would necessarily be ultra vires.

(1) [1920] A. C. 508, 526–528, 537–540.

It follows from what I have already said that the plaintiffs must necessarily have failed to show any cause of action to support the claim to send sea water through the wall attaching either to their own title or based on any agreement or consent or acquiescence of the defendant Board or its predecessors, the old Maldon Drainage Board. It is true that in their statement of claim they say nothing about sea water; but the whole history of what happened, from 1931 down to the issue of the writ, and the evidence at the trial both establish beyond doubt that the real claim put forward by or on behalf of all the owners of land in Tendring was throughout to drain whatever surplus water they might have and from whatever source—sea, rain or dirty house-water—through the sea wall into the dyke in the farm lands beyond; and even to be entitled to perforate the sea wall in order to make their right effective. No such cause of action is in my opinion known to the law. Indeed, I cannot see how there can arise any proprietary right to send any liquid, even the purest rain-water, through a sea wall in what I call the wrong direction, at any rate without the intervention by contract or licence of the competent Drainage Board under the Act, acting in its discretion and within its powers, if there be any occasion where such a position might arise; but it is unnecessary for the purpose of disposing of the present appeal to decide that question.

I am also clearly of opinion that the natural right of a higher tenement to discharge water on to a lower tenement cannot enure to the benefit of land like these saltings lying outside the sea wall. I cannot see how it can be said, wherever there has been an extension of the dry land of the country by accretion from the sea through the alluvial deposit of solid matter out of the tidal stream, and new land has gradually grown up outside the sea wall to a height above the level of the farm lands within the sea wall, as often happens, that the land outside automatically acquires a right to drain through the sea wall on to the land within still lying at its ancient level. The proposition has only to be stated to refute itself.

Similar reasoning applies to some aspects of the two alternative bases put forward by the respondents in their statement of claim—namely, the acquisition of a right under s. 62 of the Law of Property Act, 1925, and a quasi-easement. In relation to these contentions we listened to an interesting exposition of the law by Mr. Slade for the respondents, and his reasoning may well be sound as applied to the normal inland position; but I cannot see that the principles for which he contended have any application to the circumstances of the present case, and it is therefore unnecessary to express any opinion upon his contentions.

At the trial, the onus of proof rested on the plaintiffs all through to establish their cause of action, and on every aspect of proof prima facie evidence had to be given by them before the burden could be shifted on to the defendants. I cannot see that it ever was shifted at any stage of the trial; but be that as it may, I am clear in my own mind that there are only certain inferences which can properly be drawn from the evidence as a whole and I group them under two heads: (I.) (*a*) When the present sea wall round three sides of Tendring was being erected, the line chosen for its site was at or only just above the then line of foreshore and followed its contour. The maps, indeed, look as if the tidal area once extended in a north-easterly direction close up to the hamlet of Jaywick (north of which the ground begins to rise), what is now known as the counter-wall, being the sea wall of those days. The Mill Dam area and the creek at Osyth illustrate the sort of thing I have in mind, and demonstrate the way in which the Essex sea walls habitually follow the sinuosities of the foreshore, enclosing the maximum of useful land behind them. I think this guess is probably the historic truth and that the sluice at the point A through the counter-wall was only made after the new land, gradually formed in what my Lord has called " the caterpillar," had been enclosed by the present sea wall. But be my guess right or wrong, and whether the counter-wall was built before or at the same time as the sea wall, the only safe inference about the present sea wall is that when built it was put close to the foreshore and followed its then sinuosities, that is, it bends to the north at each end of the horseshoe. (*b*) At some unknown date after the sea wall was built, alluvial accretion followed in the bay enclosed by the wall and the land gradually grew upwards and also outwards, so as to conform to the general east and west line of the shore, and Tendring was thus made. (*c*) Quite recently, since a date only shortly before the Ordnance Survey of 1874, the beach on the top of the salting, where Brooklands Road now runs, was thrown up by wind and wave action. (2.) The ditch at the south foot of the sea wall was in all probability first made at a time when water in it would drain away by gravity seawards as the tide ebbed, and the culvert may quite possibly have been made at the same epoch. How far the alluvial clay bed had then grown up and how long the depression in its surface, which Mr. Latham discussed, lasted, seem to me immaterial. I only mention these matters to show they have not been ignored.

The questions of law raised by the appeal were conveniently stated by counsel for the appellants and I do not think that counsel for the respondents challenged the way in which he stated them: (1.) Can the owner of a salting have a legal right to drain salt water through a sea wall into fresh-water dykes in the land behind the sea wall? (2.) Can the principle applicable internally in England, that the owner of land on a higher level has a right to drain water on to the lower land of his neighbour, still apply where the water so sent on to the lower land (*a*) is salt, and (*b*) is sent there from the seaward side of the sea wall? To both questions, for the reasons I have already explained, I answer: No. Mr. Beyfus pointed out that, assuming the possibility of affirmative answers, the plaintiffs had put both the first two contentions on alternative ground of (i.) implied grant, (ii.) quasi-easement, and (iii.) natural right of property attaching to the higher land. From these secondary propositions I have already expressed my dissent.

(3.) I do not think it necessary to discuss the third issue posed by Mr. Beyfus: "Even if the previous questions could be answered in favour of the plaintiffs, have they in fact acquired any such right ?" But I think it is desirable to dispose of the three subordinate issues which were much discussed at the trial and before us, as, if the plaintiffs' arguments were right, they would destroy much of the value of the Act of 1930. Assuming the plaintiffs' cause of action to be established, as the learned judge held, was he right in saying that the defendants had no statutory defence under the Land Drainage Act, 1930, for their interference with the plaintiffs' right ?

I number the three points in series with the other issues.

(4.) The first was that the ascertainment of the quantum of compensation, due to the plaintiffs by reason of the defendants having interfered with their rights, was a statutory condition precedent to the exercise by the defendants of any such powers of interference, and that no such compensation proceedings had been taken.

(5.) The second was his finding, to which I have already referred, that when the penstock was added to the box sluice in the autumn of 1931, the whole became "an existing drainage work," and that under the Act the defendants had power to maintain or improve it but not to alter it.

Finally, (6.) He held that in any event the defendants had exercised their powers "in so unconscionable, harsh and unreasonable manner as to put their acts wholly outside the authorization of their statute and make them ultra vires."

As regards (4.), I can find no provision in the Act making the assessment of compensation for injury caused by the action of a Drainage Board a condition precedent to the Board's right to take the action which ex hypothesi caused the injury and conferred on the party injured the right to compensation. The only provision conferring the right to compensation is contained in s. 34, sub-s. 3 : "Where injury is sustained by any person by reason of the exercise by a drainage board of any of its powers under this section, the board shall be liable to make full compensation to the injured person, and in case of dispute the amount of the compensation shall be determined in the manner in which disputed compensation for land is required to be determined by the Land

Clauses Acts." In that sub-section there are no words to make the assessment of compensation a condition of the right of entry, and sub-s. 4 expressly authorizes entry by a Drainage Board on private land for the purpose of "maintaining existing works." I can see no ground at all for contention No. (4.).

As regards points (5.) and (6.), my view is that the only executive action taken by the defendants was to maintain an existing drainage work—namely, to repair a hole in the sea wall, the right to perforate it being the bone of contention between the parties. I do not agree that the box culvert and its penstock constituted "an existing drainage work." The sea wall was the existing drainage work, and by the removal of the culvert the defendants maintained it, or improved it. The word "otherwise" at the end of s. 34, sub-s. 1 (*b*), should not be limited by the ejusdem generis principle: that would be inconsistent with the dominant objects of the Act. The defendants are the Catchment Board and not a Drainage Board, but s. 6, sub-s. 1, confers on the Catchment Board exclusive authority to exercise all the powers conferred by the Act on Drainage Boards as defined by s. 1 of the Act: "so far as concerns the main river including the banks thereof and drainage works in connection with the main river." The powers of a Drainage Board in relation to works are to be found in s. 34, sub-s. 1: "Every drainage board acting within its district shall have power: (*a*) to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work; (*b*) to improve any existing works, that is to say, to deepen, widen, straighten or otherwise improve any existing watercourse, or remove mill dams, weirs or other obstructions to watercourses, or raise, widen or otherwise improve any existing drainage work; (*c*) to construct new works, that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act not hereinbefore referred to, required for the drainage of the area comprised within their district: Provided that a Catchment Board shall not, by virtue only of this subsection, be taken to be authorised to do any work otherwise than in relation to the main river."

The powers of a Drainage Board under s. 6, sub-s. 1, were duly transferred to the defendant Board under s. 4, sub-s. 3, by the Minister's confirmation of the scheme submitted by them. The main river became vested in the defendants pursuant to s. 6, sub-s. 3, and the above scheme. The defendants were sued as the Catchment Board exercising the powers of the Drainage Board in relation to the sea wall and dykes leading to the main river under the above provisions of the Act and Order. The plaintiffs did not dispute that the defendant Board had been duly constituted, nor that the watercourse marked red on the Minister's map, which flows out into the sea at Bond's Sluice, is the "main river" in connection with which the defendants were to perform the function of a drainage board.

In my view there is no doubt that the sea wall in question is for statutory purposes a part of the main river. "Main river" and "banks" are defined thus in s. 81: "'Main river' includes any structure or appliance for controlling or regulating the flow of water in or out of the channel, and situate therein or in any part of the banks thereof other than any such structure or appliance which is vested in or controlled by an internal drainage board; 'banks' means banks, walls, or embankments adjoining or confining, or constructed for the purpose of or in connection with, any channel or sea front, and includes all land between the bank and low water mark."

These definitions in truth go beyond the mere office of definitions proper and when read into the relevant sections have the effect of substantive enactments. The sea wall in question is thus now and has been since the issue of the catchment map in the sole and exclusive jurisdiction of the defendant Board acting as a Drainage Board for all executive purposes under the Act. I note that this was also the view of the Ministry of Agriculture as shown by their letter of November 9, 1931. I think the sea wall is "a structure for controlling," and possibly it might be added that during the time when it had a sluice through it with a penstock it was also " for regulating " " the flow of water in the channel (that is of the main river) and situate in . . . . any part of the banks thereof." The sea wall is also within the definition of " bank " as an " embankment adjoining or confining, or constructed for the purposes of or in connection with, any channel or sea front." It is therefore " an embankment . . . . in connection with the channel of the main river " and also a " drainage work in connection with the main river " within s. 6, sub-s. 1.

The Act is, as I have already said, intended to deal not only with inland drainage but with the whole problem of defence against the sea. In that regard its object is to establish an efficient system of boards and powers and duties right round our coasts in order to prevent not only actual encroachment of the sea, but also the passage of salt water on to the farm lands inside the sea defences—very often lying at a lower level than the accreted land outside—and particularly to prevent the infiltration of sea water into the fresh water supplies in the dykes where livestock go to drink. This purpose is made manifest by the definitions of " drainage " as " including defence against water " ; of " water " as " including sea water " ; and of " land " as " including water."

There are also three general considerations which are germane : (1.) the wide powers of supervision and default action given to every Catchment Board by s. 7 over internal Drainage Boards ; (2.) the dominant position assigned to every main river (see s. 2, sub-s. 4) ; (3.) the obvious intention of Parliament to get rid of all the old methods, powers and bodies concerned with drainage, sewers, sea walls and the whole business of defence against the sea, and to make a complete new code of law upon the whole subject, all the old statutes being repealed ; and how old and how numerous they were is shown by a glance at the seventh schedule.

The above considerations lead me to the conclusion that it was a main purpose of the Act to entrust a very wide measure of executive discretion to these new Drainage Boards and, a fortiori, to the Catchments Boards, who are not only made the primary executive authority wherever a main river is concerned, but also have to discharge the general duty of supervising the Drainage Boards. I cannot see on this basis that the defendants have exceeded their statutory discretion in any respect whatever under s. 34, sub-s. 1 (*a*) or (*b*); that any claim to compensation arose even if they were acting under para. (*b*); or in either case they were guilty of such conduct as the learned judge thought. They seem to me just to have been doing their duty; and I should like to add an emphatic protest against arguments that the powers of executive authorities entrusted by Parliament with important executive duties should be construed so as narrowly to limit their discretion. I think the ratio decidendi in *Institute of Patent Agents* v. *Lockwood* (1) and *Robert Baird, Ld.* v. *Glasgow Corporation* (2), the latter case concerning a question of by-laws under the Petroleum Act, is directly applicable to the executive discretion of a Catchment Board under the Land Drainage Act, 1930: see particularly the observations of the late Lord Tomlin in the latter case.

For the reasons I have given—stated, I fear, at excessive length—I think that the appeal should be allowed.

EVE J. The plaintiffs claim as owners of freehold tenements, formerly part of Cockett Wick Farm at St. Osyth in the county of Essex and known as the Tendring section, to be entitled, in common with other owners of land and premises forming part of the same section, to discharge the surface-water from time to time accumulating on the said section by means of a sluice or culvert, and allege that, in the months of October, November and December, 1935, the defendants wrongfully and in breach of the plaintiffs' said right caused the said sluice or culvert to be completely obstructed and stopped up, and that, as a result of the defendants' said wrongful acts, the surface-water could no longer be discharged from the Tendring section as theretofore and had accumulated thereon, with the result that the premises on the Tendring section belonging to the plaintiffs respectively had, with the

(1) [1894] A. C. 347.

(2) [1936] A. C. 32, 41, 42.

other premises thereon, been flooded and damaged, and the plaintiffs had been unable to obtain access thereto and had suffered damage. They claim (*a*) a declaration that the defendants are not entitled to stop up the said sluice or culvert or so to obstruct the same as to cause a nuisance or an injury to the plaintiffs; (*b*) an injunction restraining the defendants from so stopping up or obstructing the said sluice or culvert; (*c*) a mandatory order upon the defendants to remove the existing obstruction; and (*d*) damages.

By way of defence the defendants put the plaintiffs to prove their title and deny that the Tendring section stands on higher ground than a section known as the Grassland section, and that any surplus water accumulating on the Tendring section was at any time, save as thereinafter mentioned, discharged into a dyke on the Grassland section by means—as the plaintiffs had alleged in the statement of claim—of a ditch on the seaward side of a sea wall and of a sluice or culvert running through the sea wall.

The plaintiffs' case is that, on the completion of their respective purchases, they became entitled, in common with the owners of other lands and premises forming part of the Tendring section, to the right to discharge the surface-water from time to time accumulating on the Tendring section by means of the said sluice or culvert into the said dyke on the landward side of the said sea wall.

The initial difficulty which faces the plaintiffs is that this case has been launched and brought to trial without any evidence being produced in support of the existence, prior to the conveyance, of any such privilege or easement as is alleged in para. 4 of the statement of claim or of any such implied grant as is put forward in para. 5 thereof.

The burden of establishing the evidence of a state of things capable of passing by the conveyances to the purchasers the existence and enjoyment of the rights alleged in para. 7 of the statement of claim rests on the purchaser, and, unless it is established that their rights were being exercised by the plaintiffs and their predecessors, there was no continuity in the exercise of the rights and nothing in the nature of an

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SYMES AND JAYWICK ASSOCIATED PROPERTIES v. ESSEX RIVERS CATCHMENT BOARD.

Eve J.

easement capable of passing to the several purchasers. There is no evidence of the existence of the sluice or culvert being known until quite recent times, and when it was in fact disclosed to the parties it had obviously ceased to function for a lengthened time as a watercourse.

In my opinion the evidence fails altogether to prove the existence at the respective dates of the conveyances to the plaintiffs of any such rights or easements as they are seeking to establish in these proceedings. I agree also with the judgments read by my Lords.

The action ought to have been dismissed, and the appeal from the judgment must be allowed.

Appeal allowed; leave to appeal granted.

Solicitors for appellants: *Tamplin & Co., for W. Hilliard & Ward, Chelmsford.*

Solicitors for respondents: *Leonard Tubbs & Co.*

J. S. H.

INLAND REVENUE COMMISSIONERS *v.* NEW SHARLSTON COLLIERIES COMPANY, LIMITED.

K. B. D.
1936
Mar. 26, 27;
C. A.
Nov. 26, 27, 30;
Dec. 18.

Revenue—Income tax—Profits arising from lands, tenements and hereditaments—Deduction—Annual payments by mineral owner to surface owner—Leave to let down surface—Easement—Finance Act, 1934 (24 & 25 *Geo.* 5, *c.* 32), *s.* 21.

An annual payment was made by a colliery company to the surface owners under an agreement whereby the surface owners, in consideration of a minimum yearly payment of 1000*l.*, granted to the company leave to work a mine notwithstanding that such working might cause subsidence or withdrawal of support from the surface. The company claimed that this sum should be allowed as a deduction in computing its profits and gains for the purposes of assessment:—

Held, by Lawrence J., that the company was entitled to make the deduction in respect of the above mentioned payment.

Held, by the Court of Appeal (Romer L.J. dissenting), that the payment was in respect of benefits over or derived from land within the scope of the extended definition in s. 21 of the Finance Act, 1934, and that the company was, therefore, not entitled, in computing its profits and gains for the purposes of assessment, to make a deduction in respect of the said payment.

Elliott v. *Burn* [1935] A. C. 84 distinguished.

Decision of Lawrence J. reversed.

APPEAL from a decision of Lawrence J. on a Case stated under the Income Tax Act, 1918, s. 149, and the Finance Act, 1923, s. 24, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 24, 1935, New Sharlston Collieries Company, Ld. (hereinafter called "the company"), appealed against a determination of the Commissioners of Inland Revenue refusing reliefs from income tax paid by the company under assessments made under Case I., Sch. D, for the years 1928–29 to 1933–34, which the company alleged were excessive by reason of an error or mistake in the returns or statements made by it for the purposes of assessment.

2. In its return or statement of its profits and gains for each of the said years the company had made no deduction in

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respect of the sum of 1000*l.* payable under an Indenture dated July 31, 1901, hereafter referred to. The company now claimed that this sum should have been allowed as a deduction in computing its profits and gains for the purposes of assessment.

3. By an Indenture dated June 24, 1865, certain seams of coal therein described were conveyed to John Crossley & Sons, Ld., in fee simple, together with certain surface rights necessary or convenient for working and carrying away coal and liberty to dig clay for the purpose of making bricks and tiles to be used in and about the works and in the erection of workmen's cottages.

The purchasing company covenanted for itself and assigns (inter alia) :—

(*a*) Not to sink or drive any pit, shaft, drive or level which should or might weaken or damage any building belonging to the vendor or her assigns or make any ways, works, spoil heaps or clayholes within 20 yards of such building.

(*b*) To make to the vendor or her assigns satisfaction for the use and occupation of and for the spoil or damage or injury occasioned to the surface lands in the exercise of the liberties, privileges and powers thereby granted, such satisfaction to be estimated and fixed after the rate of double rent and assessments of the lands so used or occupied or to which any spoil, damage or injury should be occasioned. The sum so fixed was made payable on February 2 and August 2 in every year, and was to begin on such of the said days next after such use, occupation, spoil, damage or injury should have commenced or be occasioned and to continue until the use or occupation should cease or the spoil, damage or injury should be made good.

(*c*) Within six months of ceasing to work any pit or clayhole to fill up the same and to remove buildings and plant and to restore the surface.

(*d*) To pay to the vendor and her assigns and the tenants or occupiers of the lands full compensation for all damage or injury done or occasioned upon or to the lands or any erection or building thereon which the satisfaction of double rent and assessments and the aforesaid sum should not cover or to trees, hay, corn, herbage, grass or produce of such lands by reason of the exercise of any of the liberties, privileges and powers thereby granted.

4. By a Lease dated May 1, 1874, John Crossley & Sons, Ld., demised the said minerals, except so much of the Stanley Main Seam as was therein described, to the company for the term of 1000 years from February 2, 1872, and granted the like liberties, powers and authorities for the purpose of working the said minerals.

5. By an Agreement dated November 17, 1885, John Crossley & Sons, Ld., demised all the Stanley Main seam of coal which had been excepted and reserved from the Lease to the company for the term of 1000 years from February 2, 1872. A portion of this seam had been excepted from the Lease above referred to.

6. On April 3, 1900, on appeal by the company from a judgment of the Court of Appeal in an action brought by the then tenant for life of the surface lands, the House of Lords held that the said Indenture of June 24, 1865, did not operate as a surrender or assurance to John Crossley & Sons, Ld., of the right of support incident to the surface lands: see *New Sharlston Collieries Co., Ld.* v. *Earl of Westmorland.* (1)

7. By an Indenture dated July 31, 1901, made between the then tenant for life of the surface lands of the first part, the consenting parties therein named of the second and third parts, and the company of the fourth part, reciting that the company alleged that it was unable to work to the best advantage the said mines without letting down the surface and that under the said Indenture of June 24, 1865, the company was not entitled to work any of the said mines in such a manner as to let down the surface, it was witnessed that in consideration of the rents thereinafter reserved and of the covenants on the part of the company thereinafter contained the tenant for life in exercise of the powers vested in him granted and demised to the company for the term of sixty years from February 2, 1898, full and free liberty power and authority to work and get and carry away the whole of the

(1) [1904] 2 Ch. 443 *n.*

said mines veins and seams of coal comprised in the said Indenture of June 24, 1865, notwithstanding that such working might cause subsidence of or withdrawal of support from the surface. It was then declared that the right of the surface owners or their tenants to such pecuniary compensation as was provided for under the said Indenture of June 24, 1865, in respect of actual injury to erections or buildings, structures, sewers, pipes, drains, watercourses or other matters caused by subsidence of the surface by reason of such working should remain unaffected.

There was thereby reserved during the continuance of the said term a minimum clear yearly rent of 1000*l.* and a further acreage rent of 7*l.* 10*s.* subject to undergettings.

And it was thereby agreed that notwithstanding anything to the contrary in the Indenture of June 24, 1865, or this Indenture the company should not be bound to pay any compensation whatsoever to any person in respect of mere depression or lowering of the surface not causing any actual damage or injury to buildings, structures, sewers, pipes, drains, watercourses or other matters.

8. The company occupies an area of about five acres of the surface lands for the purposes of its buildings and plant and spoil heaps. The remainder of the surface lands is occupied by farmers or other tenants of the surface owner.

9. The said sum of 1000*l.* has been paid by the company in every year under deduction of income tax, but the surface owner now claims that the company has no right to make such deduction.

10. It was contended on behalf of the company :—

(1.) That neither the said Indenture of June 24, 1865, nor the said Indenture of July 31, 1901, conferred any right on the company to withdraw support from the surface ;

(2.) that the said Indenture of July 31, 1901, gave the company no estate or interest in the surface lands ;

(3.) that the advantage of working its mines without hindrance from the surface owner was not an easement within the meaning of s. 21 of the Finance Act, 1934 ;

(4.) that the said sum of 1000*l.* was a contractual payment made by the company for the right to work its own minerals in its own way free from any liability to an action for committing a nuisance;

(5.) that the said sum of 1000*l.* paid in each year was a proper deduction in computing the profits and gains of the company.

11. It was contended on behalf of the Commissioners of Inland Revenue:—

(1.) That the advantage enjoyed by the company under the said Indenture of July 31, 1901, was an easement within the meaning of s. 21 of the Finance Act, 1934, and that the payments made in respect thereof were "rent" within the meaning of the said section and therefore not an admissible deduction in computing the company's profits and gains for the purposes of assessment by reason of r. 3 (*l*) or (*m*) of Cases I. and II. of Sch. D.

(2.) Alternatively, that the said payments were not an admissible deduction because they were either capital expenditure or annual payments (the deduction of which is prohibited by r. 3 (*l*) of Cases I. and II. of Sch. D) or payments falling within r. 5 of No. III. of Sch. A; but it was conceded that having regard to the decisions in *Hill* v. *Gregory* (1); *O'Grady* v. *Bullcroft Main Collieries, Ld.* (2), this contention was not open before us and no argument on this point was presented.

12. The Commissioners, who heard the appeal, gave their decision in the following terms:—

"It is contended on behalf of the Crown that this last mentioned provision of the Indenture of July 31, 1901 (that is the clause set out at the end of para. 7 of this Case), conferred on the company a general right to let down the surface and that in this respect the case differed from the case of *Elliott* v. *Burn.* (3) In our opinion the right to claim damages in respect of buildings and other matters, which is expressly preserved by this instrument, could not exist if the right of support of the surface had been surrendered or extinguished. It seems to us that this provision is related to the provision in the Indenture of June 24, 1865, which is referred to above and lettered (*d*) and is designed to limit claims by tenants and others in respect of nominal damage. We, therefore, consider that the right conferred on the company is essentially of the same nature as that enjoyed by the mineral owners in the case of *Elliott* v. *Burn*. (1) It is conceded that the yearly sum of 1000*l*. does not come within r. 5 of No. III., Sch. A, nor within r. 19 of the General Rules, Income Tax Act, 1918, and the sole question before us is whether it falls within s. 21 of the Finance Act, 1934. The advantage which the company enjoys is a contractual one and does not amount to an easement. The Indenture of July 31, 1901, confers no estate or interest in the surface upon the company, and we hold that the advantage of working its own property free from interruption is not a 'right, privilege or benefit in, over or derived from land' within the meaning of the section. We further hold that the sums payable annually under the Indenture of July 31, 1901, are proper debit items in computing the company's profits for the purposes of income tax.

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(1) [1912] 2 K. B. 61.
(2) (1932) 17 Tax Cas. 93.
(3) [1935] A. C. 84.

On the footing of this decision we hold that the company is entitled to relief under s. 24 of the Finance Act, 1923."

13. The representative of the appellants, the Commissioners of Inland Revenue, immediately after the determination of the appeal declared to the Commissioners who heard the appeal his dissatisfaction therewith as being erroneous in point of law and required a Case to be stated for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149, and the Finance Act, 1923, s. 24, sub-s. 5.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown.
Mr. J. H. Bowe for the respondent company.

Lawrence J. In this case I am in agreement with the judgment of the Commissioners. The respondents, who are a mining concern, the New Sharlston Collieries Company, Ld., claim to deduct sums payable under a mining agreement in respect of the right to let down the surface, and whether they are entitled to deduct those sums depends upon whether they are or are not within the meaning of s. 21 of the Finance Act, 1934. The respondent company hold the collieries in question under a Lease dated June 24, 1865, and after the decision in the case of *New Sharlston Collieries Co., Ld.* v. *Earl of Westmorland* (1) they entered into a new Agreement dated July 31, 1901, under which the company agreed to pay 1000*l.* a year as rent, and a further acreage rent of 7*l.* 10*s.* for the right to let down the surface. Both under the original lease and under that Indenture of 1901 the collieries company were bound to pay compensation in the event of damage being done to buildings on the surface. The case really turns upon a construction of s. 21, having regard to a decision of the Courts, and particularly of the House of Lords, in *Elliott* v. *Burn.* (2) That was a case which was decided before the passing of the Finance Act, 1934, but the facts which I am invited to treat as being precisely on all fours with the facts of this case seem to me to be in no material respect different from the facts of this case. In that case the House of Lords held that the payment, which had to be made by the colliery company in question there, was not a profit within the meaning of r. 7 of No. II. of Sch. A, and therefore it was not a decision and could not be, of course, a decision upon the statute which is now before me ; but in my opinion, having regard to the passages in the judgments in *Elliott* v. *Burn* (2) to which my attention has been referred, and particularly to the speech of Lord Warrington, which was unanimously agreed to in the House of Lords, what they decided was that the right conferred by the agreement there in question (which, as I have said, I am treating and hold to be indistinguishable from the agreement now in question) was an incident of the land itself which had already suffered tax under Sch. A, No. I. Now it seems to me that s. 21 of the Finance Act of 1934 is not directed against profits arising

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(1) [1935] A. C. 84.

(1) [1904] 2 Ch. 443 *n.*

(2) [1935] A. C. 84.

from land the property in which has been separately assessed and charged, and it appears to me, therefore, that the definition of the word easement ought not to be read so as to include a right which, as the House of Lords has held, is incident to and part of land the property in which has already been assessed and charged. I therefore read the words in the definition of easement in s. 21, sub-s. 4, as not covering property which has been separately assessed and charged, and as I understand the decision of the House of Lords to be that this right to support in respect of which this payment was made is an incident and part of the property itself, in my opinion it has already suffered tax under Sch. A and is therefore not an easement within the meaning of s. 21.

I therefore agree with the decision of the Commissioners in this case, and dismiss the appeal with costs.

The Crown appealed. The appeal was heard on Nov. 26, 27, 30, 1936.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. This is a payment of rent within s. 21 of the Finance Act, 1934. "Rent," as there defined, is chargeable under Sch. D and payable in the same manner as royalties are for a patent. The payment falls under rr. 19 and 21, General Rules, All Schedules. Sect. 21 does away with *Stewart* (*H.M. Inspector of Taxes*) v. *Normanby Estate Co., Ld.* (1) and extends the meaning of rent.

The Indenture of July 31, 1901, conferred a new right to let down, but compensation in respect of damage to buildings was to be paid for as and when it arose.

In Gale on Easements, 11th ed., p. 29, the right to let down the surface is described as an easement. See also Halsbury's Laws of England, vol. 11, p. 325, para. 637.

Elliott v. *Burn* (2) has only an indirect bearing on this case. That case has been overruled by s. 21 of the Finance Act, 1934.

[They also referred to *New Sharlston Collieries Co., Ld.* v. *Earl of Westmorland.* (3)]

(1) (1933) 18 Tax Cas. 244.
(2) [1935] A. C. 84.
(3) [1904] 2 Ch. 443 *n.*

J. H. Bowe and *J. S. Scrimgeour* for the respondent company. The documents are in all respects the same as in *Elliott* v. *Burn.* (1) Sect. 21 of the Finance Act, 1934, was passed to deal with the *Normanby* case (2) and cannot be intended to extend the scope of tax to what is already taxed under Sch. A.

The surface owner's right of support is not an easement but a natural incident of the land itself. There is such a thing as an easement in cases where there is a grant of a right to let down. If the right of support is a natural incident, it is covered by No. I. of Sch. A.

Such payments are excluded from s. 21 of the Finance Act, 1934. For this section to apply, a rent must be paid in respect of land not separately assessed.

The surface owner may surrender his right of support to the mineral owner in such a way as to confer an easement. If that is done, it is within s. 21 of the Act of 1934.

Where the relevant agreement is of the character of that in *Elliott* v. *Burn* (1) there is no proper surrender of the right of support. Therefore there is no easement, and the mineral owner has not a right, privilege or benefit in, over or derived from land. All he has is an agreement that the surface owner will not sue him for committing a nuisance.

Such an agreement by the surface owner does not give the mineral owner any right over the land.

The argument on behalf of the company is based on *Elliott* v. *Burn.* (1) In that case a prima facie right to let down the surface was obtained, but that is not a right over land nor is it an easement. To enable the Crown to succeed it must be shown that a separate hereditament has been carved out of the hereditament. There would then be an easement within s. 21.

The right of support exists unless there are adequate words of severance. The profits of the landowner are fully taxed under Sch. A.

If the submission on behalf of the company is right, the company must be allowed to deduct the full amount of the royalty in computing profits.

(1) [1935] A. C. 84.

(2) 18 Tax Cas. 244.

Sir Donald Somervell A.-G. in reply.

Cur. adv. vult.

Dec. 18. SLESSER L.J. In this case the New Sharlston Collieries, Ld., claim that a sum of 1000*l.* should have been allowed as a deduction in computing its profits and gains for the purposes of assessment for each of the years 1928–29 to 1933–34, in that they contended that the annual sums of 1000*l.* were contractual payments made by the company for the right to work its own minerals in its own way free from any liability to an action for committing a nuisance in respect of mere depression or lowering of the surface not causing any actual damage or injury. The Commissioners of Inland Revenue, on the other hand, deny that such sums of 1000*l.* are proper deductions, and contend that they were payments of rent in respect of an easement as defined by s. 21 of the Finance Act, 1934. The Act in question was not in operation at the time when the assessments were made, but it was agreed by both parties that the retrospective effect provided by s. 21, sub-s. 2, should operate as applicable, and it is upon this assumption that my judgment is given.

By s. 21, sub-s. 1, of the 1934 Act it is provided that: "Where rent is payable in respect of any land the property in which is not separately assessed . . . . in respect of any easement, and (*a*) the . . . . easement is used, occupied or enjoyed" in connection with certain concerns, which include coal mines, "the rent shall be charged with tax under Sch. D and shall . . . . be treated for the purpose of such of the provisions of the Income Tax Acts as refer to royalties paid in respect of the user of a patent as if it were such a royalty." This is a reference to Sch. D Rules, Cases I. and II., *r.* 3 (*m*), which is to the effect that " in computing the amount of the profits or gains to be charged no sum shall be deducted in respect of" (*m*) "any royalty or other sum paid in respect of the user of a patent."

Before the Commissioners it was conceded that the yearly sum of 1000*l.* did not come within r. 5 of No. III., Sch. A, nor within r. 19 of the General Rules of the Income Tax Act, 1918, and the sole question before them was whether it fell within s. 21 of the Finance Act, 1934. The Commissioners held that the advantage which the benefit enjoyed was a contractual one and did not amount to an easement, and that, therefore, the company was entitled to relief in respect of an error or mistake under s. 24 of the Finance Act, 1923, and that the sums payable annually under the Indenture were proper debit items in computing the company's profits for the purpose of the Income Tax Acts.

Lawrence J. was of the like opinion, and from his judgment the Crown appeals.

The question, therefore, which has to be decided is whether the 1000*l*. so paid was or was not rent in respect of an easement within the meaning of s. 21 of the 1934 Act. By sub-s. 4 of s. 21 the expression "easement" is said to "include any right privilege or benefit in, over or derived from land." This inclusive definition is considerably wider than what is properly to be taken as an easement apart from the statutory language. Thus an easement in law is an incorporeal hereditament and has various qualities which are conveniently set out in Gale on Easements, 11th ed., p. 10, but the word of art here employed goes far beyond any such definition, and, to my mind, clearly includes rights which can in no sense properly be described as hereditaments at all.

By the Indenture of July 31, 1901, between the owners and lessees, what was here obtained by the respondents, who are such lessees of minerals (previously by Indenture of June 24, 1865, not entitled to work the mines so as to let down the surface), was full and free liberty, power and authority to work the mines notwithstanding that such working might cause subsidence of or withdrawal of support from the surface of the lands, but the owners reserved the right to compensation in respect of actual injury to buildings, etc., on the land caused by subsidence; no compensation was to be paid in respect of mere depression or lowering of the surface not so causing actual damage or injury to buildings, etc. . . . . For this qualified right to work the mines, the respondents paid the rental of 1000*l*. a year which is here the subject of consideration. In the Court below the judgment turned not so much upon the problem whether this right above stated was a right, privilege or benefit in, over or derived from land as defined by s. 21 of the 1934 Act, as upon the effect of the decision in the House of Lords in *Elliott* v. *Burn* (1), and the Commissioners also allowed the consideration of that case materially to affect their judgment.

I turn, therefore, to that authority in order to see what effect, if any, it should have upon the present decision. It may be said at the outset that the agreement in that case was to all intents and purposes similar to the present one; it contained full liberty in working mines under the lands of the lessors to withdraw from the said lands any support for such lands whether vertical or lateral, and added thereto that actual damage caused to the lands and buildings thereon should be compensated in special manner. Thereon it was argued by the Crown, in seeking to charge the owners, that they had received taxable profits in respect of rent paid for the grant of such liberty to the lessees with power to withdraw support, and that such profits arose from " lands, hereditaments, tenements or heritages not being in actual possession of the person to be charged " within Sch. A, Case II., r. 7, applied by the Finance Act, 1926, to Sch. D.

Lord Warrington took the view that the payments in question were to be regarded as arising from the ownership of the land itself, in that the right of the surface owner to support was not an easement but a natural incident to the land itself, and that the profit came to the owners in respect of their property in the lands themselves. As regards the colliery company, which more particularly here concerns us, he said that no easement to let down the surface was conferred upon them. The right of the colliery company was no more than an immunity from damages or injunction—there was no withdrawal from the lands of the owners of the right of support itself which they still possessed. In respect of the rents he held, therefore, that the tax had already been ascertained on the annual value of the lands (see the *Salisbury House* case (2)),

(1) [1935] A. C. 84.

(2) [1930] A. C. 432; 15 Tax Cas. 266.

and this assessment, in his Lordship's view, covered the whole claim, including these rents paid.

So here, I think, on a similar agreement, we are bound to say that the owners have not granted a hereditament by way of easement, nor has the colliery company vested in them an incorporeal hereditament to let down the surface, but only a release from liability to pay damages in certain events. But this judgment does not to my mind decide the matters we have to determine in the present case. In *Elliott's* case (1) the problem there posed was whether the owners' profits sought to be taxed arose from lands, tenements, hereditaments or heritages. Here the question is whether the rents, said to be proper deductions by the lessees, arise out of a right, privilege, or benefit in, over or derived from land within the language of s. 21 of the 1934 Act, and I am unable to see why, because it has been authoritatively said that, from the standpoint of the lessees, a right to be saved harmless from liability for damages or injunction for certain nuisance is not a hereditament vested in the colliery company, it follows that the payment of rent in respect of the privilege not to be sued for compensation, save for certain kinds of actual damage, is not a rent payable in respect of a right, privilege or benefit in, over or derived from land. The immunity from action is clearly a benefit, and in so far as that action if it were brought would be one for nuisance in respect of land, it follows that the rent paid is in respect of benefits over or derived from land within the scope of the extended definition in s. 21 of the Finance Act, 1934.

In my view, *Elliott* v. *Burn* (1) in dealing with the limited subject-matter of an easement and hereditament at law (primarily from the point of view of the owners but inferentially from that of the lessees) does not extend to cover the artificial enlarged definition of easements contained in the 1934 Act.

I think that the words in sub-s. 4 (*b*) are wide enough to cover the present case and there is no authority to constrain me to an opposite conclusion. In my judgment, the Crown succeeds in this appeal; the moneys are to be treated as patent royalties are treated, and, therefore, cannot be deducted in

(1) [1935] A. C. 84.

computing the amounts of the profits or gains to be charged, which must stand as originally assessed before the alleged error was made. As this is the view of the majority of the Court, the appeal will be allowed with costs.

ROMER L.J. In order to determine the question that arises upon this appeal I find it necessary, even at the cost of repetition, to state the circumstances in which it has come before us.

By virtue of an Indenture dated June 24, 1865, a company called John Crossley & Sons, Ld., acquired in fee simple certain seams of coal in Yorkshire, and a few years later they leased, or agreed to lease, these minerals to the respondent company for a long term of years. A question subsequently arose between the respondent company and the owners of the lands above the minerals as to the right of the company to work the minerals in such a way as to cause subsidence to the surface. This question was ultimately decided by the House of Lords in favour of the surface owner. It was held that the conveyance of the minerals to John Crossley & Sons, Ld., had not operated as a surrender or assurance to that company of the right of support incident to the surface lands. The conveyance had contained provisions for payment of compensation to the owners of the surface land or their tenants for damage occasioned to the surface and the buildings on it in the course of working the minerals, but those provisions were not regarded by the House of Lords as giving by implication a right to let down the surface. "I do not," said Lord Davey (1), "accede to the argument that the existence of a covenant for payment of compensation for letting down the surface is . . . . in any way inconsistent with the continuance of the common law obligation."

In consequence of this decision, the tenant for life of the surface lands and the respondent company entered into an arrangement which was embodied in an Indenture of July 31, 1901. By that Indenture it is recited (amongst other things) (1.) that the respondent company alleged that they were unable to work and get to the best advantage the said minerals without letting down the surface of all or some of the overlying lands; (2.) that under the Indenture of June 24, 1865, the respondent company was not entitled to let down that surface; and (3.) that the tenant for life in exercise of the powers therein mentioned (including so far as necessary the powers conferred upon him by the Settled Land Acts, 1882 to 1890) had agreed with the respondent company to grant to them such powers and liberties as were thereinafter mentioned. Pausing there, it may be observed that under s. 6 of the Settled Land Act, 1882, a tenant for life had power to grant a lease of a right to let down the surface of the settled land by mining operations for a term not exceeding sixty years: see *Sitwell* v. *Earl of Londesborough*. (1) By the operative part of the Indenture of July 31, 1901, the tenant for life of the surface lands granted and demised to the respondent company full and free liberty, power and authority for the respondent company their successors and assigns (all of whom were therein referred to as "the lessees") to work and get and carry away the whole of the mines veins and seams of coal comprised in the Indenture of June 24, 1865, notwithstanding that such working might cause subsidence of or withdrawal of support from the surface of the overlying lands or some of them. It was then provided that nothing therein contained should in any manner affect the right of the owners of the surface land or their tenants to such pecuniary compensation as was provided under the Indenture of June 24, 1865, in respect of actual injury to erections or buildings, structures, sewers, pipes, drains, watercourses or other matters on or in any of the said lands caused by subsidence of the surface of the said lands. Then followed a habendum and a reddendum in the following words: "To hold the same unto the lessees for the term of sixty years from the 2nd February 1898 yielding and paying therefor during the continuance of the said term a minimum certain clear yearly rent of 1000*l.* by equal half yearly payments. . . ." There was also a further acreage rent that is immaterial for the present purpose. The

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(1) *New Sharlston Collieries Co.* v. *Earl of Westmorland* [1904] 2 Ch. 443 *n.*, 447 *n.*

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(1) [1905] 1 Ch. 460.

Indenture also contained an express agreement and declaration that, notwithstanding anything to the contrary in the Indenture of June 24, 1865, or in those presents contained, the lessees should not be bound to pay any compensation whatsoever to any person in respect of mere depression or lowering of the surface of any of the said lands not causing any actual damage or injury to any such buildings, structures, sewers, pipes, drains, watercourses or other matters as aforesaid.

In the absence of authority to guide me I should have thought that this Indenture was effectual to confer upon the respondent company for a term of years the liberty, power and authority, that is the right, to deprive the surface of support by working the underlying minerals, in consideration of the payment of the rents and the obligation of paying compensation to the extent therein specified. Such a right could constitute an easement known to the law. (See *Rowbotham* v. *Wilson* (1) and *Sitwell* v. *Earl of Londesborough* (2), to which I have already referred.) The Indenture, therefore, would have conferred upon the respondent company as lessees an incorporeal hereditament subject to the payment of a rent and of compensation for the actual damage that might be occasioned by the exercise of the rights conferred.

That, I say, is what I should have held, unaided by authority. Authority, however, shows that I should have been wrong in so holding; the authority in question being the decision of the House of Lords in the case of *Elliott* v. *Burn.* (3)

In that case the respondents in the House of Lords were the surface owners of lands in the county of Durham, the minerals thereunder being owned and worked by a colliery company. By an agreement made between the respondents (therein called "the lessors") and the colliery company (therein called "the lessees") the respondents granted to the colliery company "Full liberty, in working any mines or seams of coal which the lessees might for the time being be entitled to work under the lands of the lessors . . . ., to withdraw from the said lands or any part thereof any support for such lands whether vertical or lateral. . . . ." The consideration for this grant was the yielding and paying the yearly certain rent of 150*l.* and also the yielding and paying the rent of 1½*d.* for every ton of coal worked by the lessees from underneath the respondents' said lands. It was also agreed that any actual damage caused to crops, drains, pipes or other injury to the said lands or to any buildings thereon should be compensated for in addition to the payment of the certain and tonnage rents. The surface of the land had been let by the respondents and was in the occupation of a farmer at an annual rack-rent of 296*l.*; and was taxed under Sch. A, Case I., on this footing.

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(1) (1860) 8 H. L. C. 340, 362.

(2) [1905] 1 Ch. 460.

(3) [1935] A. C. 84.

In each of the tax years, from 1923 to 1929 inclusive, sums had been paid by the colliery company to the respondents in respect of the certain and tonnage rents without deduction of tax, and the Crown sought to charge the respondents under Sch. A (or after the Finance Act, 1926, under Sch. D) with tax on those payments as being " other profits arising from lands, tenements, hereditaments or heritages not being in the actual possession or occupancy of the person to be charged " within the meaning of r. 7 of Case II. of the former Schedule. The contention of the Crown was as follows : By the agreement of December 21, 1922, an incorporeal hereditament became vested in the colliery company and the rents paid by them to the respondents represented the profits accruing to the respondents from that hereditament, which was a different hereditament from that of the surface lands, and those profits were not, therefore, profits " before enumerated " within the meaning of r. 7. If the agreement did in fact create an easement that was leased by the colliery company, the Crown's contention would appear to have been well founded. Take the case of an owner of land who creates in favour of an adjoining landowner a right of way over the land in consideration of an annual payment. From the moment that he does so he has carved out of his own corporeal hereditament an incorporeal hereditament and vested it in another; and it is only his corporeal hereditament as so diminished that will thenceforth be taxed under Case I. of Sch. A. The annual value will have been diminished to some extent, for the rack-rent of land subject to a right of way in another person will presumably be somewhat less than the rack-rent of land without any such incumbrance. The rent he receives for the right of way will be a profit accruing to him from another hereditament altogether, and will not have been covered by the tax on his land levied under Case I. The contention of the respondent landowners, on the other hand, was as follows: The right of support by the subjacent minerals is an inherent part of our corporeal hereditament—namely, the land. We have not parted with that right of support, we have merely turned it to profitable account. Income tax has already been charged under Sch. A, Case I., on the full annual value of the land, and no further charge can be made on it under Sch. A or any other Schedule. They relied, in other words, upon the well known case of *Fry* v. *Salisbury House Estate, Ld.* (1) The Court of Appeal and the House of Lords upheld this contention of the surface owners, differing from Finlay J., who had decided in favour of the Crown. In the House of Lords the only reasoned speech was delivered by Lord Warrington, the other noble and learned Lords merely concurring in the opinion that he expressed. In the course of his speech Lord Warrington said (2): "It is now thoroughly well settled and it is unnecessary to refer to specific authorities in support of the proposition, that the right of the surface owner to support of that surface by subjacent soil is not an easement, but is a natural incident to the land itself. If therefore the payments in question are to be regarded as arising from the right of support, they arise from the ownership of the land itself and would not come within r. 7 of No. II., but within No. I. and would be covered by the assessment on the annual value under No. I." And finally (3): "So far, if at all, as the payments represent a profit of the respondents, it comes to them in respect of their property in the lands themselves. Tax in respect of this property has been assessed on the annual value of the lands as ascertained under r. 1 and this assessment covers the present claim," and he referred to the *Salisbury House* case. (1) Between these two passages in his speech he dealt, as of course it was necessary to deal, with the contention put forward on behalf of the Crown that the agreement of 1922 had vested in the colliery company a separate hereditament consisting of an easement to let down the surface. He said: "The answer to this seems to me to be twofold. In the first place, in my opinion, on the true construction of the lease no such right was in fact conferred upon the colliery company, and in the second place such a right, if conferred, would be a detriment to the owners of the surface, and I cannot see how sums of money received as the consideration for granting the right to inflict that detriment can be profits or gains arising to the owners of the surface from such right itself."

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(1) [1930] A. C. 432.

(2) [1935] A. C. 94.

(3) Ibid. 95.

Pausing there, it would seem that if a right over land in the nature of an easement be conferred by a landowner in favour of his neighbour in consideration of an annual payment, such payment cannot be said to arise to the landowner "from" such right itself. If the owner of an existing incorporeal hereditament chooses to lease it, the rent payable under the lease indubitably arises from the incorporeal hereditament. Does it do so any the less because the incorporeal hereditament does not previously exist but is at the same time carved out of some corporeal hereditament and let at a rent? This question seems to have been decided by the House of Lords in the affirmative.

Lord Warrington then continued as follows: "The first answer, however, requires further consideration. I need not repeat the terms of the lease which are sufficiently set forth above. The lease gives to the colliery company for a limited and uncertain period liberty, in working any subjacent coal which they were entitled to work, to withdraw from the lands of the respondents any support for such lands. This, I think, merely means that the respondents during the term will not seek either to recover damages for nuisance or an injunction restraining the colliery company from committing

(1) [1930] A. C. 432.

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such a nuisance, but there is no actual surrender of the right of support itself. That this is so is, I think, made plain by the provisions of clauses 14 and 15 as to compensation, for it is only on the assumption that the right of support continues to exist, though its immediate assertion may be controlled, that any claim to compensation could possibly arise."

Now I cannot myself discover any material difference between the agreement with which the House of Lords were dealing in *Elliott* v. *Burn* (1) and the lease in the present case. It was not indeed suggested in the argument before us that there is any such difference. So far as there is any difference at all the case in favour of a right to let down the surface was stronger in *Elliott* v. *Burn* (1) than it is here. For there the lessees were given, in terms, full liberty in working the coal to withdraw support from the surface. Here, the lessees were given liberty to work the coal notwithstanding that such working might cause subsidence of or withdrawal of support from the surface. The leases in the two cases are, however, alike in this, that compensation was to be paid for actual damage done to the surface. A claim to compensation, said Lord Warrington, can only arise on the assumption that the right to support continues to exist, not, as presumably had been argued on behalf of the Crown, on the assumption that a right to remove that support had been given on the terms of paying compensation.

In my opinion I am bound to hold that in the present case no right to let down the surface has been acquired by the respondents the New Sharlston Collieries Company. All that they acquired under the Indenture was a release from all liability to pay damages for nuisance or to be restrained by injunction if they committed or threatened to commit the unlawful act of working their minerals so as to cause a subsidence of the surface land. That act would be just as unlawful after the execution of the Indenture as it had been before.

For the six taxing years 1928–29 to 1933–34 inclusive the respondents, in their return of profits and gains, made no deduction in respect of the sum of 1000*l.* payable under the said Indenture, though they had paid it in each year to the surface owner under deduction of tax. The surface owner, presumably after the decision in *Elliott* v. *Burn* (1), claimed that the respondents had no right so to deduct tax; and, on the authority of that case and assuming that the law applied in that case had not been altered, they were justified in their claim. On the same assumption the respondents would have been entitled to deduct the 1000*l.* in each year in making a return of their profits and gains as a necessary trade expense, it being now admitted by the Crown that such deduction would not be prohibited by r. 5 of Case III. of Sch. A. The respondents accordingly applied to the Commissioners of Inland Revenue for relief under s. 24 of the Finance Act, 1923, and s. 27 of the Finance Act, 1926. Those Commissioners refused relief on the ground I gather that since the passing of the Finance Act, 1934, the deduction from profits and gains of such payments as the 1000*l.* in this case and the rents in the case of *Elliott* v. *Burn* (1) had become unlawful.

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(1) [1935] A. C. 84.

The material part of that Act for the present purpose is s. 21, sub-s. 1 of which, so far as material, is in these terms: "Where rent is payable in respect of any land the property in which is not separately assessed and charged under Schedule A, or in respect of any easement, and (*a*) the land or easement is used, occupied or enjoyed in connection with any of the concerns specified in Rules 1, 2 and 3 of No. III. of Schedule A; . . . . the rent shall be charged with tax under Schedule D and shall, subject to the provisions of this section, be treated for the purpose of such of the provisions of the Income Tax Acts as refer to royalties paid in respect of the user of a patent as if it were such a royalty." If the 1000*l.* a year be such a rent as is here described it follows that it cannot be deducted in estimating the respondent company's profits. Sub-s. 4 of s. 21 enacts that for the purposes of the section: "(*a*) the expression 'land' means lands, tenements, hereditaments and heritages; (*b*) the expression 'easement' includes any right, privilege or benefit in, over or derived from land;".

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(1) [1935] A. C. 84.

The Commissioners of Inland Revenue having refused relief, an appeal from such refusal was taken by the respondent company to the Commissioners for Special Purposes. The respondent company contended before them (1.) that the Indenture of July 31, 1901, conferred no right on them to withdraw support; (2.) that it gave them no estate or interest in the surface lands; (3.) that the advantage of working its mines without hindrance from the surface owner was not an easement within the meaning of s. 21 of the Finance Act, 1934; (4.) that the sum of 1000*l.* was a contractual payment made by the company for the right to work its own minerals free from any liability to an action for committing a nuisance and was accordingly a proper deduction in computing their profits and gains. It was contended on behalf of the Commissioners of Inland Revenue, so far as is now material, that the advantage enjoyed by the company was an easement and the payments made in respect thereof were rent within the meaning of the said section.

The appeal was allowed by the Special Commissioners. They held, in effect, that the case was covered by *Elliott* v. *Burn* (1), that the advantage which the respondent company enjoys under the Indenture of July 31, 1901, is a contractual one and does not amount to an easement. They said that the advantage which the respondent company enjoys of working its own property free from interruption is not a right, privilege or benefit in, over or derived from land within the meaning of the section. The Crown appealed to Lawrence J. from that decision, but that learned judge upheld the decision of the Special Commissioners and, as I read his judgment, on substantially the same grounds as those which they had given. He considered that the case was indistinguishable from *Elliott* v. *Burn* (1), and that he could not consistently with that decision treat the advantages given to the respondent company as being an easement within the definition contained in s. 21.

From this decision an appeal has been brought to this Court.

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(1) [1935] A. C. 84.

It is plain that the first question to be determined is whether the advantages given to the respondent company by the Indenture of July 31, 1901, constitute an easement within the meaning of s. 21 of the Finance Act, 1934. For it could not and has not been argued that the 1000*l.* is a rent payable in respect of any land as distinct from one payable in respect of an easement, which is treated by the section as something different from land, though land according to sub-s. 4 includes any hereditament. Are, then, the advantages given to the respondent company by the Indenture in question an easement within the meaning of the section? I have already stated that unaided by the decision in *Elliott* v. *Burn* (1) I should have answered this question in the affirmative on the ground that the company thereby obtained the right of letting down the surface of the land upon the terms therein mentioned. This right, if given, would undoubtedly have constituted a privilege or benefit in and over and (possibly) derived from the land. But if what the respondent company obtained was not a right to let down the surface but merely a release from the liability of being sued for damages for a nuisance or for an injunction, they obtained no right or privilege or benefit in or over or derived from the land. It was merely a contractual right, privilege or benefit derived from the owner of the land. Unless *Elliott* v. *Burn* (1) can be distinguished from the present case this is all that the respondent company obtained. I have read and re-read the relevant documents in the two cases in an anxious endeavour to find a sufficiently material distinction between them. I thought at one time, in view of the fact that the Indenture in the present case was entered into so soon after the House of Lords had decided that the respondent company had no right to withdraw support from the surface, that there was some presumption that the purpose of the Indenture was to give them such a right in consideration of the payment of the annual rent. But in *Elliott* v. *Burn* (1) the agreement contained recitals to the effect that the lessors claimed that the lessees were not entitled to work the mines in such a

(1) [1935] A. C. 84.

manner as to let down the surface and that it had been agreed that the lessors should grant to the lessees "Liberty in working the mines and seams of coal to let down such surface upon the terms thereinafter appearing." There was, therefore, at least as good a reason in that case for making a presumption in favour of the right being granted as there is in the present case. It further occurred to me that in the present case the advantages were being conferred upon the mine-owners by a tenant for life of the surface land, and that, though he had power to grant an easement of letting down the surface, he had not so far as I know any right to deprive his successors in title of the right to claim damages or an injunction in respect of subsidence. But the same difficulty would have arisen in *Elliott* v. *Burn*. (1) Unless in that case an easement was granted, I do not see how persons claiming the land through the surface owners could have been bound by the surface owners' agreement not to sue even though the surface owners there were absolute owners. The agreement was a purely personal one, and the burden of it would not have run with the land.

I am unable to distinguish the two cases. That being so I am of opinion that Lawrence J. and the Special Commissioners arrived at a right conclusion and that this appeal should be dismissed.

If it were possible to hold consistently with the decision in *Elliott* v. *Burn* (1) that under the Indenture of July 31, 1901, the respondent company obtained an easement, that is to say some right, privilege or benefit in, over or derived from the overlying land, the second question to be decided on this appeal would be whether the 1000*l.* is a rent payable in respect of that easement. As to this I need only say that in my opinion there is nothing in *Elliott* v. *Burn* (1) to preclude us from holding that it is. All that was decided in that case in relation to this point was that the yearly sums which were there payable did not "arise" from the rights given.

I only desire to add this. The parties to the appeal were

(1) [1935] A. C. 84.

agreed that s. 21 of the Finance Act, 1934, is retrospective. This, they said, was the effect of sub-s. 2. Whether they are right in this, or not, is a question upon which I desire to express no opinion.

GREENE L.J. In this case the respondents, being lessees of certain minerals without any right to let down the surface, obtained from the surface owners by Indenture dated July 31, 1901, "full and free liberty power and authority . . . . to work and get and carry away the whole of the said mines . . . . notwithstanding that such working may cause subsidence of or withdrawal of support from the surface." The Indenture contained a proviso that nothing therein contained should affect the rights of the surface owners or their tenants to such pecuniary compensation as was provided for under the original conveyance of the minerals in respect of actual injury to buildings and other matters on the land caused by subsidence. There was an express clause to the effect that no compensation was to be payable in respect of mere depression or lowering of the surface not causing actual damage or injury to such buildings or other matters. The consideration payable by the respondents, which was described as a rent, was the sum of 1000*l.* a year certain together with an acreage rent or royalty.

The question to be decided on this appeal is whether or not in computing the profits of the respondents' business for the purpose of assessment under Sch. D for the years 1928–29 to 1933–34 they are to be treated as having been entitled to deduct as an expense the sum of 1000*l.* payable under the Indenture in those years. It is agreed by both parties to the appeal that by reason of the retrospective provisions contained in sub-s. 2 of s. 21 of the Finance Act, 1934, the question is to be dealt with as though that section had been in force during the relevant period, and I will accordingly deal with it on that basis without expressing any opinion as to the correctness of that view.

The section provides in sub-s. 1 that where rent is payable in respect of any land the property in which is not separately assessed and charged under Sch. A or in respect of any easement and the land or easement is used occupied or enjoyed in connection with, among others, a colliery concern, the rent shall be charged with tax under Sch. D and shall be treated in the same way as a royalty paid in respect of the user of a patent. The result of this provision in the case of the payments to which it refers is that the sums paid cannot be deducted in computing the profits of the payer's business but the payer is entitled to deduct tax when making the payment to the payee. Sub-s. 4 defines "easement" as including "any right, privilege or benefit in, over or derived from land." Looking at that definition by itself, I should have thought it reasonably clear that the right conferred on the respondents by the Indenture of July 31, 1901, was a right privilege or benefit in, over or derived from land. That Indenture expressly gives a right to the respondents so to act in relation to the surface as to cause it to subside, and the fact that a right to compensation is preserved would not appear to affect this circumstance. But in the history of this case two different views have been taken. The Special Commissioners, founding themselves upon *Elliott* v. *Burn* (1), held that the right to claim damages in respect of buildings and other matters which is expressly preserved by the Indenture of July 31, 1901, could not exist if the right to support of the surface had been surrendered or extinguished. In other words, they treated that Indenture as granting no easement within the meaning of the definition clause in the section on the ground that it merely excluded the right of the surface owners to pursue certain legal remedies in respect of workings which might interfere with the surface. Lawrence J., on the other hand, decided in favour of the respondents upon a different ground, which was also based on the decision in *Elliott* v. *Burn*. (1) That ground was that the right conferred by the Indenture was an incident of the land itself and had already suffered tax under Sch. A, No. I., and that the word "easement" ought not to be read so as to include a right which is incident to and part of land the property in which has already been assessed and charged.

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(1) [1935] A. C. 84.

These decisions make it necessary to examine with care the case of *Elliott* v. *Burn.* (1) The question in that case arose under r. 7 of No. II. of Sch. A. The Crown there was seeking to tax the recipient of annual payments arising under a document the effect of which, it is agreed, was in all essential matters the same as that of the Indenture of 1901 in the present case. In order to succeed the Crown has to establish that the sums in question were profits "arising from lands, tenements, hereditaments or heritages not being in the actual possession or occupation of the person to be charged." The matter therefore fell to be regarded from the point of view of the recipient, and the question was: Did the profits arise to him from rents, tenements, hereditaments or heritages not in his actual possession or occupation? Now the surface itself was in the actual possession and occupation either of the owner or his tenant, and the Crown endeavoured to escape this difficulty by treating the right of support as a separate hereditament for the purpose of r. 7 and the rent payable as a profit arising from that hereditament. The House of Lords negatived this contention. Lord Warrington, in whose opinion the other members of the House concurred, points out that in a sense the sums there in question arose from the right of support which belonged to the surface owner, but that the right of support is nothing more or less than a natural incident to the land itself and the property in that land had already borne tax under Sch. A, No. I. Down to this point Lord Warrington is dealing with the right conferred from the point of view of the surface owner; but the Crown raised an alternative contention and endeavoured to examine the nature of the right from the point of view not of the grantor of the right but of the grantee. They argued that in the hands of the colliery company the right was a hereditament, being, as it was said, a right or easement (in the strict sense) to let down the surface in working their mines without objection on the part of the surface owners. Lord Warrington gave two

(1) [1935] A. C. 84.

answers to this contention. The first was that upon the true construction of the document no such right was in fact conferred upon the colliery company—it was on this that the finding of the Commissioners in the present case was based. He arrived at this conclusion by construing the provision giving liberty to withdraw support as merely meaning "that the respondents will not seek either to recover damages for nuisance or an injunction restraining the colliery company from committing such a nuisance," and as effecting "no actual surrender of the right of support itself." The second reason given by Lord Warrington for dismissing the Crown's alternative argument is not relevant to the present appeal.

Now it will be observed that, as Lord Warrington points out (1), the Crown in that case had to establish that the sums in question arose from some "hereditament" and in holding in answer to the Crown's alternative argument that upon its true construction the document there in question did not effect an actual surrender of the right of support, he was using that expression in relation to the language of r. 7 of No. II. of Sch. A, which was the rule there in question, namely the word "hereditament." His construction of the document necessarily negatived the Crown's contention that the sum arose from a "hereditament"; but with all respect to the opinion of the Special Commissioners I cannot see how that decision in *Elliott* v. *Burn* (2) provides an answer to what is the relevant question in this case, namely—is the right conferred by the indenture of 1901 a "right privilege or benefit in, over or derived from land?"—words whose import goes far beyond that of the technical word "hereditament" contained in r. 7.

The decision of Lawrence J. is based on an application of the principle upon which Lord Warrington answered the first contention of the Crown in *Elliott* v. *Burn*. (1) But, with all respect to the learned judge, I cannot agree with his conclusion. In *Elliott* v. *Burn* (1), as I have already said, it was necessary to point to a "hereditament" distinct from the land itself, the reason for this being that in relation to the

(1) [1935] A. C. 93, 94.

(2) Ibid. 84.

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facts of that case r. 7 so provided. The House of Lords held that the attempt to sever the right of support from the land in order to convert it into a separate hereditament was based on a misconception of the law relating to the right of support. Under s. 21 of the Finance Act, 1934, once the existence of an easement within the meaning of the section is established, the question whether the land in respect of which the easement is enjoyed is or is not separately assessed and charged under Sch. A is, in my opinion, irrelevant. The opening words of sub-s. 1 make this clear, since they draw a clear distinction between rent payable in respect of any land the property in which is not separately assessed and charged under Sch. A and an easement in the case of which no such qualification is requisite in order to bring the section into operation. There may be difficulties in understanding the reasons for which the Legislature in the case of concerns affected by s. 21 decided to treat easements enjoyed by them in this special manner. But in my opinion the section is too clear to permit of the interpretation which the learned judge has placed upon it.

My conclusion is that the case of *Elliott* v. *Burn* (1) in truth does not decide the question either in favour of the view taken by the Special Commissioners, or in favour of that taken by the learned judge. Its only relevance to the present question lies, I think, in the fact that, in construing a document in all material respects similar to that now in question, the House held that it did not operate to effect an actual surrender of the right of support, but merely prevented the surface owner from taking the appropriate legal proceedings if the right of support were interfered with or threatened. Accepting this finding as governing the construction of the present instrument, I still find myself unable to say that the rights conferred by it do not fall within the wide definition of "easement" in s. 21. It may be observed that, unlike r. 7 of No. II. of Sch. A, s. 21 regards the right conferred and the payments made in respect of it from the point of view of the grantee of the right who makes the payment. From this point of view it appears to me that by virtue of the Indenture

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(1) [1935] A. C. 84.

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of 1901 the respondents obtained an "easement" in that they obtained the right to act in such a way as to affect the physical condition of the surface without exposing themselves to the operation of certain of the legal remedies which would otherwise have been available to the surface owners. It is perhaps worth noticing that if the respondents' contention be right, the effect of the section could in general be avoided, in a case where a concern desired to obtain an easement, by the simple expedient of so drafting the document as to make it in effect an undertaking not to sue, for example, for damages for trespass in a case where a wayleave was desired. It appears to me that the language of the definition clause, using as it does words of general import and not technical expressions, is sufficiently wide to prevent such a result.

In my opinion the appeal should be allowed with costs.

Solicitors: *Solicitor of Inland Revenue; Blundell, Baker & Co., for Greaves, Atter & Beaumont, Wakefield.*

J. L. D.

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Jan. 28, 29;
Feb. 1.

Revenue—Income Tax—Sch. E—Minister of Methodist Church—Required residence in manse—Payment of Sch. A tax and rates by employers on his behalf—Emoluments of office.

A minister of the Methodist Church, appointed minister of a circuit containing nine churches, resided in a manse provided, furnished, decorated and repaired by his employers, the Church, which manse was not part of larger premises belonging to the Church. It was a requirement of his appointment that he should reside in the manse in order to the better performance of his duties, and he was not allowed to sublet it or make any profit from his occupation.

Sch. A tax, rates and water rate in respect of the manse were paid on his behalf by the Church:—

Held, that the amount of such tax and rates did not form part of the emoluments of his office in respect of which he could be taxed under Sch. E, as his occupation of the manse was representative and not beneficial.

Principles laid down in *Tennant* v. *Smith* [1892] A. C. 150 applied.

Inland Revenue Commissioners v. *Miller* [1930] A. C. 222 distinguished.

Decision of Lawrence J. [1936] 2 K. B. 645 affirmed.

APPEAL from a decision of Lawrence J. on a Case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts. (1)

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on February 26, 1935, the Rev. Joseph Reed (hereinafter called "the minister") appealed against an assessment to income tax made upon him under Sch. E to the Income Tax Acts in respect of his office as a minister of the Methodist Church for the year 1934-35, on the ground that there had been included therein a sum equal to the local rates, water rate and income tax under Sch. A paid in respect of the manse in which he resided in the circumstances below mentioned. The sole question for the consideration of the Court was whether the said sum, being the Sch. A tax of the said manse together with local rates and water rate thereon, formed part of the minister's emoluments of office as a minister of the Methodist Church for the purposes of the said assessment

(1) [1936] 2 K. B. 645.

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to income tax. The Sch. A assessment book showed the minister as occupier and the Wesleyan Methodist Church as owner of "Westerley," Crossland Road, Redhill, the house in question. The contents of the assessment book were not known to the minister.

In September, 1930, the minister was appointed by the Wesleyan Methodist Conference to be the minister of the Wesleyan circuit of Redhill, Surrey. The circuit comprised two churches at Redhill, two at Reigate, and one each at Meadvale, Earlswood, Bletchingley, South Merstham and Horley. His appointment involved that he should go and reside at the said house or manse, which was provided for the minister of the Redhill circuit. This he did, though the house was in fact too large for his needs. The Wesleyan Methodist Church was now merged into the Methodist Church. The general control of the Methodist churches was vested in the Annual Methodist Conference. The Conference consisted of certain ex-officio members and of the elected representatives of districts which were divided into circuits.

Each circuit might consist of any number of churches and acted through a representative committee called the quarterly meeting, which appointed at least two administrative lay agents called circuit stewards. These officers were responsible for seeing that the financial needs of the circuit were met. The circuit, acting through its quarterly meeting, provided the minister's stipend and bought, took on lease, or otherwise provided a manse from which the minister appointed to the circuit carried on his work, which consisted of preaching, pastoral work and administration. A minister was not allowed to sublet the manse he occupied nor to make any profit out of his occupation, and the cost of furnishing, decoration and repairs was borne by the circuit. In the present case Sch. A tax, the rates and the water rate were defrayed by the circuit stewards out of moneys provided by the quarterly meeting out of contributions from the churches in the circuit.

It was a strict requirement that a minister appointed to a circuit should live in the house provided by the circuit, whether it was suitable for him or not, in order that he might perform his duties. The average stipend was less than 300*l.* per annum, so that only in an exceptional case could a married minister afford to live elsewhere than in the manse provided. It was usual for a minister to remain on a circuit for not less than three years and not more than six. The circuit had no power of appointment or dismissal, but the appointment might be terminated by the Conference at any time without previous notice.

On behalf of the minister it was contended (1.) that his occupation of the manse was representative and not beneficial and that the sum representing Sch. A tax in respect of the said manse together with water rate and local rates thereon should be excluded from the assessment ; (2.) that the minister at no time had notice that he was assessed to tax under Sch. A, and that in any event an assessment under the Schedule was conclusive only as to the amount of the assessment.

It was contended on behalf of the Crown (1.) that the fact that the minister was assessed to Sch. A tax on the manse, and was not able to pass on the burden of tax by deduction against any other person, was conclusive in favour of the Crown so far as the Sch. A tax was concerned ; (2.) alternatively, that the minister in fact enjoyed the beneficial occupation of the manse ; (3.) that the tax under Sch. A, the rates and water rate were exigible from the minister personally as the occupier of the manse, and these payments having been defrayed by the circuit stewards formed part of the emoluments of his office ; (4.) that the assessment was correct in principle and should be confirmed, subject to an agreed minor adjustment of figures.

The Commissioners held that the minister's occupation of the manse was beneficial and that the said sum equal to the Sch. A tax together with the amounts representing water rate and local rates thereon formed part of his emoluments of the office for the purposes of income tax assessable upon him under Sch. E.

Lawrence J. reversed the finding of the Special Commissioners.

The Crown appealed. The appeal was heard on January 28, 29 and February 1, 1937.

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Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown.

Cyril King for the minister.

The arguments fully appear from the judgments.

LORD WRIGHT M.R. In this appeal from the judgment of Lawrence J., notwithstanding the very able and interesting arguments that we have heard from the Attorney-General and Mr. Hills, I feel that the judgment of Lawrence J., which is a very careful judgment, is right and should be affirmed; and indeed I agree very completely with the way in which he has dealt with the question.

The case has some special features. The question is whether a minister, a Wesleyan, or rather now a Methodist Church minister, is assessable under Sch. E to an amount which corresponds with the Sch. A tax on the manse which he occupies under circumstances which I shall explain in a moment. The way in which the question specifically arises is this. He is the occupier of the manse—I use the word "occupier" in a non-technical sense—but the Sch. A tax together with the local rates and the water rate, which for this purpose need not be specially distinguished, are paid by the Church, if for the moment I may so describe the position. It is well established and it was held by the House of Lords in *Hartland* v. *Diggines* (1), where the income tax was paid under circumstances for this purpose comparable with those in the present case on behalf of the person whom it was sought to assess, that it might be added to his emoluments for the purpose of an assessment under Sch. E.

The Crown contend in the present case, that as the minister is the occupier under Sch. A of the manse, and therefore liable to be assessed under Sch. A as occupier of the house under rr. 1 and 2 and as he is relieved from paying something which he ought in law to have paid, his emoluments are to be treated as enhanced accordingly. The Crown say that in this case he is the occupier for the purpose of Sch. A. On the other hand it is said on behalf of the minister that he is not for the purpose of Sch. A the occupier, but merely has the enjoyment of premises under such circumstances that he is not liable for Sch. A tax or for local rates or water rate at all, and therefore that these sums cannot be added to his emoluments, but must be disregarded.

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(1) [1926] A. C. 289.

The question which has to be decided, namely, whether he is the occupier or not, is in one sense a question of fact, that is to say, the answer can only be ascertained by a careful consideration of all the circumstances of the case; but it is obvious that in order to investigate the facts it is necessary to determine what are the correct principles of law to be applied, and therefore, although the question in one sense is a question of fact, it is one which depends upon the application of the appropriate principles of law, and it is one of those questions which are often described, not very happily, as mixed questions of fact and law. In this particular case, as I read the findings of the Commissioners, they have stated their conclusion as a question of law for the Court. That is found in para. 8 of the Case: "We, the Commissioners who heard the appeal, held, that the appellant's occupation of the manse was beneficial and that the said sum equal to the Sch. A tax, together with the amounts representing water rate and local rates thereon, formed part of his emoluments of office for the purposes of income tax assessable upon him under Sch. E." The learned judge has rather approached the matter upon the footing that upon the detailed facts set out in the Case there is no evidence on which that conclusion can be arrived at. I prefer to say that there is a question of law raised on the facts as stated and that it depends on what view is taken of the law whether the decision of the Commissioners is to be upheld or not. But, however the question is stated, it comes to the same thing for all practical purposes. The learned judge has come to a conclusion contrary to that arrived at by the Commissioners, and it is from that conclusion that this appeal is brought.

There is one point I may pass over at once. It appears that in the Sch. A assessment book the minister is entered as occupier of the premises in question. It is not suggested that the minister here was any party to or had any knowledge

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of that entry. The Attorney-General has very properly stated that he does not rely on that fact, and that it must be ascertained from all the circumstances of the case whether the minister was in occupation in the proper sense of the term for the purposes of deciding the present question.

The question which is raised depends on the principles which have been considered in a number of cases which have been brought to the notice of the Court. The question may be stated very summarily in this way. The minister is undoubtedly living in the house in question as a dwelling-house—it is occupied as a dwelling-house—but it is said that his user of the house as a dwelling-house, though to that extent it may or possibly may not be for his advantage or convenience is ancillary to service to and for the purposes of the Methodist Church, which he serves in his capacity as pastor and minister. It is said that under those circumstances his possession and his enjoyment of the premises are for the benefit of the Church ; that his occupation is their occupation and that the Church and the Church alone is properly assessable as occupier both for income tax and for purposes of rating. On the other hand it is said that he is actually in the enjoyment of the premises and dwells in them, and gets full use of them, and that being so he is the occupier in the relevant sense. It appears from the Case that the minister was appointed by the Wesleyan Methodist Conference to be a minister of the Wesleyan Methodist Circuit in 1930. That statement introduces two terms : one is the Conference and the other is the Circuit—I shall in future call the Church the Methodist Church, which it appears now is the correct appellation owing to the merger which has taken place. The Conference, as it is called, the Annual Methodist Conference, is a body which has general control vested in it of the Methodist Church ; it consists of ex-officio members and of elected representatives of districts which are divided into circuits. A circuit, therefore, is a sub-division of the area covered by the Conference as a whole. The circuit in question of which the respondent is minister comprises a number of churches, two at Redhill, two at Reigate and one each at Meadvale, Earlswood, Bletchingley

South Merstham and Horley. The house in question, "Westerley," Crossland Road, Redhill, is the manse provided for the minister of that circuit. Para. 5 of the Case says: "Each circuit may consist of any number of churches and acts through a representative committee called the Quarterly Meeting which appoints at least two administrative lay agents called Circuit Stewards. These officers are responsible for seeing that the financial needs of the circuit are met. The circuit acting through its quarterly meeting provides the minister's stipend and buys, takes on lease, or otherwise provides a manse in which the minister appointed to the circuit is required to reside and from which he carries on his work, which consists of preaching, pastoral work and administration." I gather from that, applying the general statement to this particular case, that the house is provided by the circuit, and we were told that the property was vested in trustees. Whether that is so or not is not material, because the Case sets out quite clearly that the minister is neither the owner nor the lessee of the premises in question. He is, however, required to reside there, and that is the centre from which he carries on his widely spread and multifarious activities in pursuance of his ministry.

The Case proceeds to say that he is not "allowed to sublet the manse he occupies nor to make any profit out of his occupation, and the cost of furnishing, decoration and repairs of a manse is borne by the circuit. In the present case the Sch. A tax, the rates and the water rate were defrayed by the circuit stewards out of moneys provided by the quarterly meeting out of contributions from the churches in the circuit. It is a strict requirement that a minister appointed to a circuit should live in the house provided by the circuit whether it is suitable for him or not in order that he may perform his duties. The average stipend is less than 300*l*. per annum, so that only in an exceptional case could a married minister afford to live elsewhere than in the manse provided. It is usual for a minister to remain on a circuit for not less than three years and not more than six. The circuit has no power of appointment or dismissal, but the appointment may be terminated by the Conference at any time without previous notice.'' Now, I treat the Church here as the occupier of the manse.

It is not necessary to apportion the different functions between circuit and Conference. If the minister is not in law in occupation of these premises, then no question has been raised that the owner of the property which may be compendiously, not perhaps very accurately, described as the Church or it may be the trustees or one or other of them, will fulfil the position of the occupier for tax purposes. No question, as I follow, has been raised on that point, but it is argued for the Revenue Authorities that the minister is the occupier in the full sense of the term. The judge has held that is not so, and as I have already said I agree with his conclusion. The essence of the matter, I think, is that the enjoyment which the minister has of this house, the enjoyment in the sense that he uses it as a dwelling-house and therefore in the sense that it is a benefit to him, is subsidiary and ancillary. He dwells in the house, not for his own convenience —we do not know in this case whether it would have been more convenient for him to live in a house or in a residence of a simpler character ; but in fact he lives there for the purposes of the Church as part of the obligations which he owes to the Church as part of his service, and under the compulsory requirement of the Church, as it is said, whether it is suitable for him or not, in order that he may perform his duties. Under those circumstances the authorities as well as the principles which have been laid down to my mind involve the view that he is not the occupier for revenue purposes.

Let me refer to the cases to which the attention of the Court has been drawn. There are two cases in the House of Lords which it may be convenient to refer to at once. One is *Tennant* v. *Smith* (1), where the person it was sought to charge as occupier was the agent of a bank and the premises in question were premises of the bank. The question arose there in slightly different context, because the question was whether the annual value of the premises ought to be added to the remainder of

(1) [1892] A. C. 150.

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his income in order to ascertain his total income for tax purposes ; but the same question was raised—namely, was he in occupation in the eyes of the law. It was held that he was not. I pass over a number of observations in which stress is laid on the fact that he could not sublet the premises, and that his enjoyment of the premises could not be turned into money in any sense. That, I venture to think, is not now a relevant test ; but Lord Watson states the position in this way (1) : "The appellant is not a proprietor, neither is he an occupier within the meaning of Sch. B. The bank are the only occupiers, being, as Lord Herschell said in *Russell* v. *Town and County Bank* (2), 'in the same position as if that portion of their bank premises were used in any other way in the strictest sense for the purposes of the bank and the business of the bank.' The appellant does, no doubt, reside in the building, but he does so as the servant of the bank and for the purpose of performing the duty which he owes to his employers. His position does not differ in any respect from that of a caretaker or other servant, the nature of whose employment requires that he shall live in his master's dwelling-house or business premises instead of occupying a separate residence of his own." Then to the same effect Lord Macnaghten says (3) : "The next point to be considered is what is the nature of the appellant's occupation of the residence provided for him in the bank premises. From the case stated for the opinion of the Court of Exchequer in Scotland it appears that 'the appellant is bound, as part of his duty, to occupy the bank house as custodier of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours.' He is not entitled to sublet the bank house or to use it for other than bank business, and in the event of his ceasing to hold his office he is under obligation to quit the premises forthwith. Property, therefore, in the house he has none, of any sort or kind. He has the privilege of residing there. But his occupation is that of a servant, and not the less so because the bank

(1) [1892] A. C. 158. (2) (1888) 13 App. Cas. 418, 426.
(3) [1892] A. C. 162.

thinks proper to provide for gentlemen in his position in their service accommodation on a liberal scale. It is clear, therefore, that the appellant is not chargeable under Sch. A in respect of the bank house, or liable to pay the duty as occupying tenant. The bank and the bank alone is chargeable and liable to pay." I think the principles laid down there apply to this case. It is perfectly true that in that case the dwelling in which the bank agent lived was a part of the bank premises, but I do not regard that as in any sense essential to the determination of this issue. The question is whether the dwelling-house in this case is being used for the purposes of the Methodist Church, and whether the minister lives in it for the purpose of performing his duty which he owes to the Church. I do not find that the question that the premises so dwelt in are part of the larger premises belonging to the employer, if I may so call him, has ever been emphasized as an essential feature of the matter. It was not so emphasized in this case. It is mentioned as part of the actual facts, but I have not found it referred to as essential in any other case which has been cited to me and I do not know of any such case, so I do not think it is of the essence of the matter at all. If you take as an analogy the case of coachmen, or chauffeurs, or gardeners, where cottages are provided within the close or curtilage of the employer, it can equally happen that the employer provides a cottage outside his close or curtilage, but in a position convenient to him for the performance by his servant of the duties for which he is employed. In this particular case it is obvious that the area which the ministrations of the minister have to cover extends over a considerable sphere. There are a number of churches which he has to serve, and no doubt the members of the circuit whose spiritual welfare he has to look after are spread over a considerable distance in space, and the house was no doubt chosen as being conveniently placed for the purposes of the circuit.

The other case in the House of Lords to which we have been referred is an entirely different case, and is only important by way of contrast. It is *Inland Revenue Commissioners*

v. *Miller.* (1) The facts there may be very shortly stated to be these. Lady Miller was occupying—I use the term in a neutral sense—a mansion house and premises free of rent and taxes. Her late husband had in his will directed his trustees to allow her so to do under certain conditions, and the question was whether she was assessable in respect of that occupation and whether its value should be included as part of her total income for purposes of assessment to super-tax. It was held by the House of Lords that she was so assessable, and the gist of the matter is put very shortly by Lord Buckmaster, who says (2): " Her occupation was in her own right and she was not occupying as the representative of the trustees." A little above he had said that the position was not affected by the circumstance that she was entitled " to have the taxes paid by the trustees." It was a clear case, and it seems to me on the judgments in the House of Lords, though there was some difference in the Courts below, a case in which she occupied and had a beneficial right under the will to enjoy full occupation so long as the conditions of the trust applied. She was not occupying for the purpose of discharging any duty or doing any service to any one else, and I can see no reason now why it should not be held that the charges were to be added to her total income. Lord Dunedin, referring to *Tennant* v. *Smith* (3), says (4): " The whole point was that it was found as a fact that the occupation of the bank by the agent was not truly his occupation, but the bank's occupation and the tax due under Sch. A was no more leviable on the agent than it would have been on a caretaker who lived on the premises to keep them clean." There again I think the same principles are stated, though no doubt with reference to the particular facts there in question and with reference to the case of a caretaker; all those different illustrations are merely instances of a general principle—namely, was the occupation of the bank by the agent his own occupation, or was it in truth the occupation of the bank employer or the occupation of the

(1) [1930] A. C. 222.
(2) Ibid. 229.
(3) [1892] A. C. 150.
(4) [1930] A. C. 236.

persons who were being served by the agent?

That that is the true view appears from a number of cases, but I shall only refer to a few. In *Dobson* v. *Jones* (1) the question was whether the appellant was entitled to be entered on the voting list, and the question stated there was whether he was a tenant of certain premises within the meaning of the Franchise Act then current, and it was held that he was not. He was a surgeon at the Greenwich Hospital and he had a house in the infirmary in the hospital appropriated to him as surgeon. The surgeons who were not resident within the hospital were allowed a weekly sum as lodging money; there was no exchange allowed of apartments, and the repairs were done by the Commissioners. Those were the facts. What I want to refer to is the statement of principle by Tindal C.J. in *Dobson* v. *Jones* (1), who referred to an earlier and somewhat similar case, *Hughes* v. *Chatham Overseers* (2), where he said: In *Hughes'* case (2) " we drew the distinction between those cases where officers or servants in the employment of government are permitted to occupy a house belonging to the government as part remuneration for the services to be performed, and those in which the places of residence are selected by the government, and the officers or servants are required to occupy them, with a view to the more efficient performance of the duties or services imposed upon them." I think the latter statement applies to this particular case. Tindal C.J. is referring back to what is said in *Hughes'* case (3): " But it may be, that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not *permitted* to occupy, as a reward, in the performance of his master's contract to pay him, but *required* to occupy in the performance of his contract to serve his master." The converse case on the facts is *Smith* v. *Seghill Overseers*. (4) I refer to it because it contains a statement of the same principle as that which I have extracted from the other cases. In that case a colliery provided a number of houses for the benefit of its workmen and filled up those houses at their discretion, giving preference to married men: "A workman could not go into a house without the owner's concurrence," but he was not in any way bound to live in any one of those houses. The headnote says: "It was not absolutely necessary for a workman to live in one of the houses to perform his work." It was held that there the workman was a tenant. The principle is stated in this way (1): "The colliery owners desire that the married workmen should reside near the works, but that does not change the relation between the parties; unless the men are required to live in the houses for the better performance of their duties, it does not convert the occupation of a tenant into that of a servant. The governing principle is that, in order to constitute an occupation as a servant, it must be an occupation ancillary to the performance of the duties which the occupier has engaged to perform. Here the occupation is not connected with the performance of the employment, and the appellants, therefore, occupy as tenants." I do not know what distance of space there was in that case between the actual pit-head and the cottage, but that circumstance is not treated as relevant from one or the other point of view.

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(1) (1844) 5 Man. & Gr. 112, 120.

(2) (1843) 5 Man. & Gr. 54.

(3) 5 Man. & Gr. 78.

(4) (1875) L. R. 10 Q. B. 422.

The only other cases to which I need refer are two cases which cannot be regarded as of any assistance. They are two cases from the Scottish Courts subsequent to *Tennant* v. *Smith.* (2) One is *M'Dougall* v. *Sutherland.* (3) In that case it was a question again of whether the income of the minister did or did not reach a point which would deprive him of the benefit of abatement, and in order to ascertain the true figure it had to be considered whether the annual value of the manse which he occupied was to be taken into account in calculating his total income. It was held by the Court there that he was not occupying as a tenant, and that the annual value was not chargeable. The decision, however, of the case depended upon the view which the Court took of certain expressions of opinion in *Tennant* v. *Smith* (2), which

(1) L. R. 10 Q. B. 429.
(2) [1892] A. C. 150.
(3) (1894) 3 Tax Cas. 261.

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had been decided and had been before the Court when the matter came before the Inner House, or Court of Exchequer in Scotland. That Court put its decision on this ground: I quote a few words: " It does not appear to me "—said Lord Adam—" that the right to occupy a dwelling-house on these terms is one which was intended to be convertible into money. I think, therefore, that the principle of the case of *Tennant* v. *Smith* (1) applies to this case, and that the value of the manse ought not to be added to the respondent's income." In respect of that case Lord Buckmaster expressed his disapproval. He said the case of *M'Dougall* (2) was wrongly decided. That is put perhaps rather more clearly by Lord Dunedin in *Lady Miller's* case. He says (3): " I am therefore of opinion that the distinction taken between what might be let and what might not be let is not a relevant distinction, and the *Free Church Manse* case "—that is *M'Dougall's* case (2)—" which was distinguished from the *Established Church Manse* case (4) on that ground was wrongly decided." The same view was expressed more fully by Lord Warrington. He says (5): " the decision being determined by the view that, inasmuch as in the opinion of the Court the minister could not let the manse, or otherwise turn the annual value thereof into money, such annual value was not part of his income. In my opinion this case was incorrectly decided." That case, therefore, has been overruled, because the ground on which the Court based their decision was erroneous and involved misapprehension of the true effect of the decision in *Tennant* v. *Smith*. (1) It appears to me, looking at the statement of facts at p. 158 of 3 Tax Cases, that in truth the case ought to have been decided simply on the ground that during the incumbency of a particular minister the manse was to be for his use for the time being, that is to say either for life or so long as " he shall remain minister thereof." Therefore, on that footing the case would come within the principles of *Lady Miller's* case (6), the manse being vested in trustees, as appears from the statement, subject to that particular trust in favour of the minister, and thereby the minister would during the appropriate period be in beneficial possession of the manse in his own right.

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(1) [1892] A. C. 150.
(2) 3 Tax Cas. 261.
(3) [1930] A. C. 235.
(4) *Corke* v. *Fry* (1895) 3 Tax Cas. 335.
(5) [1930] A. C. 239.
(6) [1930] A. C. 222.

The later case of *Corke* v. *Fry* (1) is also based upon the same misreading of the decision in *Tennant* v. *Smith.* (2) In that case it was held that the incumbent was assessable and it was said in *Lady Miller's* case (3) to have been correctly decided but for the wrong reason. I need not repeat what that reason was. It was the same reason as was adopted in *M'Dougall's* case. (4) It appears from the facts stated that the incumbent, who was an incumbent of the Established Church in Scotland, was in truth the owner and proprietor of the premises, and there was no ground there for applying to his case, as far as I follow the facts, the principles which I have already extracted from the cases to which I referred at an earlier stage of this judgment. There was no ground for saying there that the occupation was merely for the purposes of the Church or was a compulsory term of his incumbency. For these reasons I agree with the conclusion and the reasoning of the learned judge, and I think the appeal ought to be dismissed with costs.

ROMER L.J. The appellant in this case is a minister of the Methodist Church, and in due course was appointed to be minister of the Methodist circuit of Redhill, the appointment to that post being made by the Annual Methodist Conference, in whom is vested the general control of the Methodist churches. The circuit itself is controlled by a committee called the quarterly meeting, and the circuit acting through the quarterly meeting has to provide the minister's stipend, and it buys, takes on lease, or otherwise provides a manse in which the minister appointed to the circuit is required to reside, and from which he carries on his work, which consists of preaching, pastoral work, and administration. I would like to point out that it would seem probable that part at any rate of the

(1) 3 Tax Cas. 335.
(2) [1892] A. C. 150.
(3) [1930] A. C. 222.
(4) 3 Tax Cas. 261.

work of administration would be carried on in the manse rather than in any one of the churches which are in the circuit. However that may be—I am reading from the Case—his appointment involved that he should go and reside at "Westerley," which was the manse provided by the circuit for the minister of the Redhill circuit. It further appears from the Case that it is a strict requirement that a minister appointed to a circuit should live in the house provided by the circuit, whether it is suitable for him or not, in order that he may perform his duties. In these circumstances I am of opinion that the principle to be applied to this case is the principle applicable to the case of master and servant. That principle has been enunciated in several cases, but probably in no case more clearly than by Tindal C.J. in the case to which my Lord has referred of *Hughes* v. *Chatham Overseers*. (1) In his judgment in that case Tindal C.J. said (2): "A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and if he do so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration. But it may be, that a servant may occupy a tenement of his master's, not by way of payment for the services, but for the purpose of performing them; it may be that he is not *permitted* to occupy, as a reward, in the performance of his master's contract to pay him, but *required* to occupy in the performance of his contract to serve his master." It is true that these observations were made in a case in which the Court had to consider whether the servant occupied as a tenant within the meaning of the rating statute of 2 Will. 4, c. 45. In my opinion the same principle is applicable to a case where the question is whether the servant is an occupier within the meaning of the Rules to Sch. A. In my opinion, on the facts to which I have referred, the minister in this case occupies the manse, not by way of payment for his services, but for the purpose of performing them. He is not permitted to occupy as a reward in the performance of his master's contract to pay him, but is required to occupy in the performance of his contract to serve his master. It has been contended before us that that principle is only applicable where the servant occupies a part of a tenement belonging to his master. No such qualification is to be found in the rule stated by Tindal C.J., and I know of no authority for the introduction of any such qualification into the principle. I agree, however, that for the purpose of deciding on which side of the line a particular case falls the fact that the servant is occupying the whole rather than part of his master's tenement is a relevant circumstance which should be taken into consideration. In my opinion the minister in this case is not the occupier of the manse within the meaning of the Rules to Sch. A. Whether that occupier be the Methodist Church or the Annual Conference or the circuit or the trustees, in whom I understand the manse is vested in law, it is not necessary to consider—one or other of those bodies is the occupier. The minister in my opinion clearly is not.

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(1) 5 Man. & Gr. 54.

(2) Ibid. 78.

I will only add this, that in the case to which we were referred and which my Lord has already mentioned of *M'Dougall* v. *Sutherland* (1), the manse which was in question there was vested in trustees who held it upon trust " for behoof of the Free Church Congregation of Rothesay, and it is thereby declared that the manse is to be for the use of the minister for the time being, of the said congregation, during his life and so long, but so long only, as he shall remain minister thereof." The minister therefore occupied the manse not as a term of his employment at all, but because the moment he was appointed to the particular living he ipso facto became a cestui que trust under the trust document. The case, therefore, is very similar to *Lady Miller's* case (2), to which my Lord has referred.

The other case to which we were referred relating to the occupation by a minister of a manse was that of *Corke* v. *Fry*. (3) In that case on the facts being examined it will be found that the manse was the freehold, if that be the proper word to apply to a Scottish hereditament, of the minister

(1) 3 Tax Cas. 261. (2) [1930] A.C. 222.
(3) 3 Tax Cas. 335.

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himself. If he was not in occupation nobody else was. The freehold vested in him not as one of the terms of his appointment, but vested in him ipso facto upon his appointment to the benefice. In point of fact it was held that he was not the occupier, but only because, as my Lord has pointed out, the learned judges who decided that case were under the impression that the determining factor in all such cases was whether the occupation could or could not be turned to profitable account by the alleged occupier.

For these reasons, in addition to those given by the Master of the Rolls, which are really in substance those given in the Court below by Lawrence J., I agree that this appeal fails and must be dismissed.

Greene L.J. I agree. The crucial matters of fact in this case are contained in the paragraphs in the Stated Case which have been already read where the nature of the minister's use of this house and the reasons why he is compelled to use it are set forth. Those paragraphs to my mind make it quite clear that the house is not provided merely as a convenience for the minister where he can live or not as he pleases. Its use is not necessary for him in the sense merely that it is necessary for every one to live somewhere. He is required to live there because it is necessary for him to do so for the proper performance of his duties. He is put into the house by the authorities of the Church, and I can see no distinction between this case and the case where a chauffeur or gardener is put into a house or a cottage in order that he may perform the duties which fall to be performed by him. The house, I think, may not inaptly be compared to an implement of trade provided by the employer and put in the employee's hands, which he is under an obligation to use.

It was said on behalf of the Crown that the principle is not applicable unless it can be said that the house is in some sense part of some larger hereditament which is in the occupation of the employer. I am quite unable to see on what logical ground any such distinction can be based. The true fact of the matter, I think, is this: Work may be of such a character that residence in a particular place may be essential for its performance. In the case of manual workers and the like the character of the work which they have to perform will in general be work which requires their presence on the master's premises. To take the case of a caretaker or a policeman who is employed round and about a police station, or to take a case which is not a case of a manual worker, but in this respect very much resembles it, that of a bank manager, in all those cases the character of the work to be performed necessarily involves the presence of the person employed in a particular limited area or curtilage. But when you are dealing with work such as that which has to be performed by a minister of the Wesleyan Church, work which involves the service of a number of scattered churches in addition to the work of administration and pastoral work, obviously the considerations of the place where he is to live are of the very greatest importance and cannot be limited or tied down as they would be in the case of a manual labourer. The very character of the work itself makes it impossible to locate the minister in one place such as a particular church. For instance, if he has six churches to serve, quite clearly to locate him in a manse forming part of the same building as one of them would not achieve the object desired. Therefore, when the character of the minister's work is considered it seems to me that it brings out very clearly the illogical nature of the distinction which the Crown attempted to draw.

I only wish to add one word. Great stress was laid on *Lady Miller's* case (1), and cases of that description, where under a trust a beneficiary is permitted to use or to live in a residence. I do not propose to occupy time by giving my reasons for thinking that these cases do not touch the point, because it seems to me that the distinction between them and the present is too obvious to need explanation.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for the minister: *Butt & Bowyer.*

W. I. C.

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(1) [1930] A. C. 222.

1937
Jan. 29.

ROCHDALE CORPORATION *v.* LANCASHIRE COUNTY COUNCIL.

Poor Law—Settlement—Removability—Rate-aided patient in mental hospital—Whether period of residence in hospital to be excluded in determining husband's settlement—Poor Law Act, 1930 (20 *Geo.* 5, *c.* 17), *ss.* 18, 85, *sub-s.* 2; 86, *sub-s.* 1; 93, *sub-s.* 1—*Mental Treatment Act,* 1930 (20 & 21 *Geo.* 5, *c.* 23), *s.* 18, *sub-s.* 1.

A married woman, normally residing with her husband, had been during the greater part of the three years next preceding October 4, 1935, in receipt of relief as a rate-aided patient in a mental hospital. No other relief had been granted to her or to her husband. The husband, who was previously settled in the County of L., had resided during those three years in the County Borough of R.; but there had been no period of residence sufficient to give him a settlement or status of irremovability there, if the period of his wife's receipt of relief was to be excluded.

The wife having become chargeable to the County of L. an order was made by justices for her removal to R.:—

Held, that the effect of the second proviso to s. 18, sub-s. 1, of the Mental Treatment Act, 1930, was that the husband's settlement must be determined by the antecedent law, as though that section had not been passed, and consequently that by s. 93, sub-s. 1, of the Poor Law Act, 1930, the time of his wife's confinement as a rate-aided patient must be excluded from the computation, and that he was not and therefore his wife was not, last settled in R., and the order of removal was bad.

CASE stated under s. 11 of the Quarter Sessions Act, 1849.

The Corporation of the County Borough of Rochdale appealed against an order made on June 8, 1936, under the Poor Law Act, 1930, (1) by two justices for the County of Lancaster, on a complaint made by the respondents the Lancashire County Council, whereby Sarah Farrar, a poor person, was ordered to be removed to the County Borough of Rochdale. Sarah Farrar ("the poor person") was born on July 13, 1888, and had been since September 17, 1915, and still was the wife of Herbert Livesey Farrar ("the husband"). The poor person was being maintained in various mental hospitals in the County of Lancaster, and was therein receiving relief as a rate-aided patient from August 18, 1928, to August 22, 1931, from November 25, 1931, to July 19, 1935, and from March 28, 1936, to the time at which the case was stated. Except during those periods she resided with her husband, and no relief other than that given to her as a rate-aided patient during those periods had been given to the poor person or the husband.

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(1) Poor Law Act, 1930:—

Sect. 18: "All relief given to or on account of a wife shall be considered as given to her husband,..."

Sect. 85, sub-s. 2: ". . . a married woman shall take and follow the settlement of her husband."

Sect. 86, sub-s. 1: "Where a person has resided for the term of three years in a county or county borough in such manner and in such circumstances in each of those years as would, in accordance with the provisions contained in this Act, render him irremovable, he shall be deemed to be settled in that county or county borough."

Sect. 93, sub-s. 1: "No person shall be removed, nor shall any order be made for the removal of any person, from any county or county borough in which he has resided for one year next before the application for the order: Provided that any time during which he has been— . . . . .

The husband resided at Heywood in the County of Lancaster from September, 1923, to October 15, 1928, and from October 4, 1935, onwards. From October 15, 1928, to October 4, 1935, the husband resided at Norden Road, Bamford. Until October 1, 1933, Norden Road, Bamford, was in the County of Lancaster. On that day it was transferred to the County Borough of Rochdale by virtue of the Lancashire (Southern Areas) Review Order, 1933. By that Order a person residing in the transferred area having acquired, or in process of acquiring a settlement or a status of irremovability in the County of Lancaster was to be deemed to have acquired, or to be in process of acquiring such settlement or status in

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(*c*) confined in an institution for lunatics; or (*f*) resident in a workhouse of, or otherwise in receipt of poor relief from, the council of a county or county borough or a board of guardians; shall not be regarded as interrupting his residence in the county or county borough, but shall for all purposes be excluded in the computation of time hereinbefore mentioned."

The Mental Treatment Act, 1930, s. 18, sub-s. 1: "A person shall not be deemed to be in receipt of poor relief or be deprived of any right or privilege or be subjected to any disability by reason only that he or a member of his family is being maintained under the provisions of the principal Act or of this Act in any place as a rate-aided patient:

Provided that nothing in this section shall affect— . . . . . .
(*b*) any provisions of the Lunacy Acts, 1890 to 1922, or of the Poor Law Act, 1930, relating to the settlement or chargeability of a patient. . . . ."

the borough in which the transferred area was thenceforth included.

On June 8, 1936, the poor person being then chargeable to the County of Lancaster, the order appealed against for her removal to Rochdale was made.

The appellant Corporation contended (*a*) that by virtue of s. 18 of the Poor Law Act, 1930, the relief given to the poor person during the periods when she was a rate-aided patient was considered as given to the husband; (*b*) that by reason of the proviso to s. 93, sub-s. 1, of the same Act the husband's residence at Norden Road, Bamford, was not such as would render him irremovable therefrom except between August 22, 1931, and November 25, 1931, and between July 19, 1935, and October 4, 1935 [i.e., during the periods when the poor person was not in receipt of relief as a rate-aided patient]; (*c*) that the husband never acquired a settlement in the County Borough of Rochdale under s. 86, sub-s. 1, of the Poor Law Act, 1930, or otherwise, and that the poor person had accordingly not derived any such settlement from the husband under s. 85, sub-s. 2, of that Act; (*d*) that proviso (*b*) of s. 18, sub-s. 1, of the Mental Treatment Act, 1930, prevented that sub-section from affecting the position; (*e*) that the poor person was not last settled in the County Borough of Rochdale.

The respondent Council contended (*a*) that by virtue of s. 18, sub-s. 1, of the Mental Treatment Act, 1930, the husband was not to be deemed to be in receipt of poor relief or deprived of any right or privilege or subjected to any disability by reason that the poor person was being maintained under the provisions of the Lunacy Act, 1890, or the Mental Treatment Act, 1930, in any place as a rate-aided patient; (*b*) that the husband resided for the term of three years from October 4, 1932, to October 4, 1935, at Bamford in the County Borough of Rochdale in such manner and in such circumstances in each of those years as rendered him by s. 93 of the Poor Law Act, 1930, irremovable therefrom, and therefore by virtue of s. 86, sub-s. 1, of the Poor Law Act, 1930, was to be deemed to be settled in the County Borough of Rochdale; (*c*) that by virtue of s. 85, sub-s. 2, of the Poor Law Act, 1930, the poor person took and followed the settlement of the husband and had therefore a settlement in the County Borough of Rochdale at the time of her admission to a mental hospital on March 28, 1936; (*d*) that it having been established, as by s. 95 of the Poor Law Act, 1930, provided, that the poor person was not irremovable from the County of Lancaster and was last settled within the County Borough of Rochdale, the order of removal was correctly made and was good in law.

The question for the opinion of the Court was whether or not the poor person was last settled in the County Borough of Rochdale.

Percy Lamb for appellants. The justices have failed to give effect to the second proviso to s. 18, sub-s. 1, of the Mental Treatment Act, 1930. The effect of that proviso is that questions of settlement are to be determined on the law as it stood under the Poor Law Act, 1930, as though s. 18 had not been passed. We are therefore thrown back to the proviso to s. 93, sub-s. 1, of the Poor Law Act, 1930, and the time during which the wife was confined as a rate-aided patient is to be excluded for all purposes from the computation of time. If that is done, it is found that the husband had not resided in the County Borough of Rochdale in such a way and for such a time as to acquire a settlement under s. 86 of the Poor Law Act, 1930.

Nield for respondents. The preservation, by the second proviso to s. 18, sub-s. 1, of the Mental Treatment Act, 1930, of the position under the Poor Law Act, is confined to the patient, and does not extend to the husband of the patient. It must be assumed that the contrast is deliberate between the words "by reason only that he 'or a member of his family' is being maintained . . . . as a rate-aided patient" in the enacting part of s. 18, and the words "relating to the settlement or chargeability of a patient" in the proviso. Therefore the wife's detention as a rate-aided patient does not affect the time required for the husband to gain a settlement. For three years immediately before October 4, 1935, the husband lived in Rochdale. During part of that time his wife was in receipt of relief, but since

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he was not himself the patient he acquired a settlement notwithstanding.

[LORD HEWART C.J. Your argument seems to ignore the proviso, which seems to say that the question of settlement is still to be decided by the antecedent law.]

A husband is not to be placed at a disadvantage merely because of his wife's affliction, which leads to her becoming a rate-aided patient. But if he himself becomes a patient, his right to acquire a settlement is suspended so long as he continues in receipt of relief.

LORD HEWART C.J. This is a case stated for the opinion of this Court pursuant to s. 11 of the Quarter Sessions Act, 1849.

The case arises in this way. On June 8, 1936, upon a complaint made by the County Council of Lancashire, two justices for Lancashire ordered a poor person to be removed to the County Borough of Rochdale. Notice of appeal against that order was in due time given, and afterwards, by the consent of the parties, and by order, this case was stated between the appellants, who are the Corporation of Rochdale, and the respondents, the Lancashire County Council.

The question which is raised is the question whether it was right to make an order removing this poor person to the County Borough of Rochdale. She was born in 1888, and since 1915 she has been and remains the wife of one Herbert Livesey Farrar.

It is not necessary to reiterate the chronology of the case. It is common ground between counsel on both sides that if the law had remained in all respects as it was before the Mental Treatment Act, 1930, it could not be true to say that the husband had, at the material time, acquired a settlement in, or a status of irremovability from, the County Borough of Rochdale. That is the effect of the various sections of the Poor Law Act, 1930, to which our attention has been directed. But it was urged on the part of the respondents both in the court below and in this Court that the effect of s. 18 of the Mental Treatment Act, 1930, is to vary that conclusion, and the question which we have to decide is whether, so far as the removal of this married woman is concerned, s. 18 of the Mental Treatment Act, 1930, enables her removal.

That section provides that : " A person shall not be deemed to be in receipt of poor relief or be deprived of any right or privilege or be subjected to any disability by reason only that he or a member of his family is being maintained under the provisions of the principal Act or of this Act in any place as a rate-aided patient." But that enactment is subject to a threefold proviso, and the middle part of that proviso is as follows : " Provided that nothing in this section shall affect—(*b*) any provisions of the Lunacy Acts, 1890 to 1922, or of the Poor Law Act, 1930, relating to the settlement or chargeability of a patient." In other words, when one is asking oneself the question where was Mrs. Farrar settled, that question is to be answered by reference to the antecedent law, and is not in any sense affected by the provisions of s. 18 of the Mental Treatment Act, 1930.

It is suggested, in the ingenious argument which we have had from Mr. Nield, that the effect of s. 18, properly construed, is to draw a distinction between the husband and the wife, but I cannot accept that argument. The question is the settlement or chargeability of a patient. The settlement or chargeability of the patient is to be determined now as it would have been determined before the Mental Treatment Act, 1930, was passed ; in other words, the settlement followed the settlement of the husband, and if by reason of the fact that the husband was not settled in Rochdale the wife was not settled in Rochdale, that conclusion remains true notwithstanding the passing of the Mental Treatment Act, 1930.

I think the contentions made in the court below by the appellants were correct, and that the answer is that the poor person was not last settled in the County Borough of Rochdale. It is common ground that it follows from that conclusion that the poor person was last settled in the County of Lancaster, but that question is not expressly raised. The question, and the only question, which is raised is whether or not the poor person was last settled in the County Borough of Rochdale,

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and I think the answer to that question is: "No, she was not."

SWIFT J. I agree.

GODDARD J. I agree.

Appeal allowed.

Solicitors for the appellants: *Sharpe, Pritchard & Co., for the Town Clerk, Rochdale.*

Solicitors for respondents: *Norton, Rose, Greenwell & Co., for Sir George Etherton, Preston.*

J. W. H.

SCINDIA STEAMSHIPS (LONDON), LIMITED *v.* THE LONDON ASSURANCE.

1936
Dec. 15, 16.

Insurance (*Marine*)—*Policy*—" *Inchmaree* " *clause*—" *Damage to hull or machinery .... caused .... through .... breakage of shafts, or through any latent defect* "—*Breakage of shaft through latent defect therein*—*Liability of insurer for damage to shaft*—*Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 55, *sub-s.* 2 (*c*).

A time policy of marine insurance, by which a steamship belonging to the plaintiffs was insured by the defendants and others, contained a clause known as the " Inchmaree " clause in the following terms : " This insurance also specially to cover (subject to free of average warranty) loss of or damage to hull or machinery directly caused by accidents in loading, discharging, or handling cargo, or in bunkering or in taking in fuel, or caused through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull."

During the currency of the policy the steamship was in dry dock undergoing an operation which required the removal of the propeller and tail shaft. While the propeller was being wedged off, the shaft broke owing to a latent defect therein, the end of the shaft with the propeller attached to it falling into the dock and a blade of the propeller being broken. The defendants admitted liability for the damage to the propeller.

The plaintiffs brought an action against the defendants, their claim being that the defendants were liable under the above clause in the policy to the extent of their proportion in respect of the damage to and cost of repairing the shaft :—

Held, that the plaintiffs' claim failed in view of the following considerations, namely :—

That the words " breakage of shafts " in the clause could not be transferred from their context to a position immediately before the words in brackets, so as to read " This insurance also specially to cover breakage of shafts," inasmuch as such a construction would do undue violence to the clause ;

That the clause on its true construction meant that the insurance covered loss of or damage to hull or machinery occasioned by any of a number of occurrences which were arranged in groups, each group beginning with the expression " caused by " or " caused through " ; the only two of these occurrences appropriate to the present case being " breakage of shafts " and " latent defect " ;

That, though the shaft was part of the machinery, the damage involved in the breakage of the shaft was not damage to hull or machinery " caused through " breakage of the shaft, inasmuch as that expression could only refer to damage to some other part of the hull or machinery occasioned by the breakage of the shaft, and could not refer to damage involved in the breakage of the shaft itself; and

That, for a similar reason, the damage involved in the breakage of the shaft through a latent defect therein was not damage to hull or machinery "caused through" that latent defect.

Oceanic Steamship Co. v. *Faber* (1906) 11 Com. Cas. 179; (1907) 13 Com. Cas. 28, judgment of Walton J. approved and adopted.

Hutchins Brothers v. *Royal Exchange Assurance Corporation* [1911] 2 K. B. 398 applied.

ACTION tried by Branson J. in the Commercial Court without a jury.

The Scindia Steamships (London), Ld. (hereinafter called "the plaintiffs"), were at all material times the owners of the steamship *Jalavijaya*.

By a policy of marine insurance dated January 20, 1931, and made between the plaintiffs of the one part and The London Assurance (hereinafter called "the defendants") and others of the other part, it was provided among other things that the defendants, in consideration of a premium of 80*s*. per cent., should insure the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the said steamship, in the sum of 1364*l*., part of 35,000*l*., for twelve calendar months from December 17, 1930, to December 17, 1931, against the risks and upon the terms and conditions contained in the policy and the printed clauses attached thereto; these risks including, among others, perils of the seas and all other perils, losses and misfortunes that had or should come to the hurt, detriment or damage of the steamship or any part thereof; and the printed "steamer clauses" attached to the policy, including the following clause, commonly known as the "Inchmaree" clause—namely: "This insurance also specially to cover (subject to free of average warranty) loss of or damage to hull or machinery directly caused by accidents in loading, discharging or handling cargo, or in bunkering or taking in fuel, or caused through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull; provided such loss or damage has not resulted from want of due diligence by the owners of the ship or any of them, or by the manager. . . . ."

On December 12, 1931, the *Jalavijaya* was placed in dry dock at Bombay by and on behalf of the plaintiffs, as owners, for the purpose of renewing the lower half of the wood lining of the stern bush, and for that purpose it was necessary to remove the propeller and draw the tail-end shaft. At 2 P.M., while the propeller was being wedged off, the shaft broke at the point where the cone begins owing to a latent defect in the shaft at that point, and the propeller and the tapered end of the shaft fell into the bottom of the dock and one blade of the propeller was broken off. By reason of that damage it became necessary to fit a new shaft and propeller to the steamship.

On September 28, 1936, the plaintiffs brought the present action against the defendants claiming as for a loss under the policy.

The plaintiffs in their points of claim stated the above mentioned facts, and further stated, among other things (para. 3), that the tail-end shaft had been examined by Lloyd's register surveyor at Bombay on December 27, 1929; (para. 4) that the plaintiffs had suffered a loss within the terms of the policy; and that the plaintiffs claimed a declaration that the defendants were liable to the extent of their proportion under the policy to indemnify the plaintiffs in respect of the damage to and cost of replacing the tail-end shaft.

The defendants in their points of defence admitted the facts stated above prior to the mention of the action, and further stated, among other things (para. 2), that they had no knowledge of and made no admission as to the survey alleged to have been made in December, 1929; that they admitted that at the point where the tail shaft broke there was a flaw in the shaft which had not been apparent while the shaft was in position; and that they admitted that the operation of wedging off the propeller would not have broken off the shaft but for the existence of the flaw; (para. 3) that they admitted that under the policy they were liable to indemnify the plaintiffs against loss arising out of the damage to the propeller, but denied that the damage to the tail shaft had been caused by or through any risk covered by the policy or that such damage was a loss within the terms of the policy or that they were under any liability with regard to such damage (1); that they did not admit that any latent defect there might have been in the tail shaft had arisen during the currency of the policy; that further the plaintiffs had suffered no loss or damage through the breakage of the tail shaft (other than the damage to the propeller), since the shaft was of no value or no value save as scrap-iron owing to the existence of the flaw; and that the plaintiffs had received the value of the shaft as scrap-iron; and (para. 4) that save as expressly admitted every allegation in the points of claim was denied.

At the trial the following documents or copies thereof were in evidence :—

A report of surveys for repairs, etc., of the engines and boilers of the *Jalavijaya* made at Bombay on December 20, 1929, and December 24, 1929, by a surveyor to Lloyd's register of shipping, concluding as follows: "The machinery of this vessel, so far as now seen, is in efficient condition, and is eligible in my opinion to remain as classed with fresh records" as therein mentioned.

An average adjusters' statement containing a summary of the facts and setting out copies of the documents mentioned below.

An entry in the engine-room log-book made at Bombay on December 12, 1931, which stated (inter alia): "While disconnecting the propeller from the tail-end shaft, all of a sudden the cone of the shaft gave way from near the end of liner. This was caused by a deep hidden flaw and which was found after the propeller dropped, and this flaw was found to be the old flaw."

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(1) During the argument the defendants obtained the leave of the Court to add to their points of defence an allegation that in respect simply of breakage of shafts they could not be liable under the "Inchmaree" clause by reason of the Marine Insurance Act, 1906, s. 55, sub-s. 2 (*c*).

A letter from the master to the owners dated Bombay, December 16, 1931, observing in regard to the accident: "This was caused by an old hidden deep flaw which was found after propeller dropped off."

A letter from the chief engineer to the owners dated Bombay, December 16, 1931, reporting that the accident "was caused by a deep flaw, which was found after the propeller dropped and this flaw was found to be the old flaw."

In regard to the entry in the engine-room log and these two last letters the average adjusters made the following note: "We are advised by the owners that the chief engineer explains that when the shaft broke a portion of the flaw was found with a rusty spot which led him to determine that it was 'the old flaw.' There was no previous knowledge of the flaw prior to the breakage in dry dock December, 1931."

A copy of a report dated December 23, 1931, of a survey made by the surveyor to Lloyd's register of shipping, which stated that upon examination on December 13, 1931, and subsequently while the vessel lay in dry dock the surveyor found "The screw shaft broken off at the end of the liner exposing a deep smooth flaw extending downwards from the top as the shaft then lay. Approximately one-half of the material was sound and had been newly fractured. One blade of the cast iron propeller broken off at root by its fall."

It also appeared from the average adjusters' statement that the owners obtained offers for the broken propeller and shaft and that these were disposed of for the best offer received.

Sir R. Aske K.C. and *W. L. McNair* for the plaintiffs. The plaintiffs are entitled to be indemnified by the defendants in respect of the breakage of the tail shaft under the steamer clause attached to the policy which expressly mentions breakage of shafts and latent defect. That clause came into existence in consequence of the decision of the House of Lords in *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1), and is known as the "Inchmaree" clause, because that was the name of the ship there concerned.

(1) (1887) 12 App. Cas. 484.

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The clause on its true construction covers loss or damage by reason simply of breakage of shafts, and as the damage in the present case consisted in the breakage of the shaft it is covered by the clause. Where a policy covers breakage of shafts, the fact of the breakage of a shaft is sufficient to give the insured a claim under the policy whatever may have been the cause of the breakage. The first case in which the clause was considered was *Jackson* v. *Mumford* (1), in which it was held inferentially that breakage of the shaft would have been within the policy. If the clause does not cover breakage of shafts simply, then, at all events, on its true construction it covers loss or damage to hull or machinery through breakage of shafts, and since in the present case the shaft was part of the machinery, the damage through the breakage of the shaft is covered by the clause. Further, the clause covers loss or damage to hull or machinery through any latent defect in the machinery, and, since the shaft was part of the machinery, and the breakage of the shaft is clearly shown to have been due to a latent defect therein, that damage is covered by the clause.

Miller K.C. and *T. G. Roche* for the defendants. The "Inchmaree" clause in the policy on its true construction does not cover the damage which the plaintiffs allege they have suffered and which is the ground of their claim. Even assuming that the clause purported to cover loss or damage by reason simply of breakage of shafts separated from all the other matters mentioned in the clause, it would not entitle the plaintiffs to recover damages in respect of the breakage of the shaft in the present case. The evidence shows that the breakage of the shaft was due in this instance to a latent defect in the shaft itself. A claim under a marine insurance policy in respect of a latent defect is dealt with by the Marine Insurance Act, 1906, s. 55, sub-s. 1 (*c*), which provides that "unless the policy otherwise provides, the insurer is not liable for . . . . inherent vice or nature of the subject matter insured." In this case the policy does not provide that the insurer is to be liable for breakage of shafts

(1) (1902) 8 Com. Cas. 61.

caused by a latent defect, and therefore if the clause assumes to cover mere breakage of shafts the defendants are not liable. The clause on its true construction provides that the insurance is to cover loss of or damage to hull or machinery due to any of certain occurrences which are arranged in groups or categories each of which begins with the words "caused by" or "caused through": see per Walton J. in *Oceanic Steamship Co.* v. *Faber.* (1) It is said by the plaintiffs that their claim for breakage of the shaft through a latent defect therein comes within the clause because one of these groups includes "breakage of shafts" or because another of them includes "latent defect." The clause, however, on its true construction does not insure against damage to hull or machinery consisting in any of the occurrences or conditions mentioned therein, but against damage to hull or machinery "caused by" one or other of these occurrences. It is true that the shaft is part of the machinery, that breakage of the shaft is breakage of part of the machinery, and that breakage of the shaft owing to a latent defect is breakage of a part of the machinery owing to a latent defect; but damage arising from such an occurrence is not damage "caused by" that occurrence to the hull or machinery within the meaning of the clause. Where a part of the machinery becomes defective or deranged the clause does not cover the damage to that part of the machinery itself, but only damage to some other part of the hull or machinery caused thereby. That is the construction which was put upon the clause by Walton J. in *Oceanic Steamship Co.* v. *Faber* (1), where the facts were very similar to those in the present case, and it was claimed that damage consisting in the breakage of a propeller shaft through a latent defect came within the clause; and his view was approved by Moulton L.J. in the Court of Appeal, which affirmed his judgment. That construction of the clause was afterwards approved by the Court of Appeal in *Hutchins Brothers* v. *Royal Exchange Assurance Corporation.* (2) The case of *Jackson* v. *Mumford* (3) gives some guidance as to

(1) 11 Com. Cas. 179, 187; on appeal 13 Com. Cas. 28.
(2) [1911] 2 K. B. 398.
(3) 8 Com. Cas. 61.

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the meaning of the expression "latent defect" in the clause. These cases clearly show that the clause does not protect the insured against a latent defect in the hull or machinery. The insured must himself bear the loss or damage involved in such a defect. The fact that a shaft breaks owing to a latent defect does not make a claim in respect of the breakage any the less a claim in respect of a latent defect. The plaintiffs sustained no appreciable loss or damage through the breakage of the shaft, because at and before the time of the accident the shaft owing to the latent defect therein had no value except as scrap-iron.

Sir R. Aske K.C. in reply. It cannot be regarded as settled that the "Inchmaree" clause covers only damage consequential upon the breakage of a shaft and not the damage thereby caused to the shaft itself. In *Oceanic Steamship Co.* v. *Faber* (1) the judgment of Lord Alverstone M.R. proceeded on the ground that there was no evidence that the damage to the shaft through a latent defect in the shaft itself arose during the currency of the policy. If there had been such evidence it would seem that he would have held that the damage was recoverable. Buckley L.J. said that he did not agree with Walton J.'s view that the recoverable loss was confined to injury to other parts of the ship by breakage of the shaft, but thought that it included loss arising from the defect in the shaft itself. (2) Even Walton J. himself and Moulton L.J. (3) would seem to have entertained some doubt whether the clause did not cover the breakage of the shaft itself. *Hutchins Brothers* v. *Royal Exchange Assurance Corporation* (4) is not applicable to the present case. There a latent defect became patent for the first time during the currency of the policy, and it was held that that fact did not constitute actual damage recoverable under the policy. Here not only did the latent defect in the shaft become patent during the currency of the policy but it caused the breakage of the shaft and thereby did actual damage. It appears from the Marine Insurance Act, 1906, s. 55, sub-s. 2 (*c*), that a policy may provide by express words for the insurer being liable for losses which are generally excepted, such as inherent vice, from the nature of the subject-matter insured: per Atkin L.J. in *E. D. Sassoon & Co.* v. *Yorkshire Insurance Co.* (1)

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(1) 13 Com. Cas. 28.

(2) Ibid. 36.

(3) 13 Com. Cas. 34.

(4) [1911] 2 K. B. 398.

BRANSON J. This case raises a point which has been adumbrated for a number of years. It relates to the proper construction to be put upon the words of a clause called the "Inchmaree" clause in a Lloyd's policy. The facts of the case are not in dispute. [His Lordship stated the facts and the issues between the parties substantially as above set out and continued as follows:] The case depends upon the true construction of the clause, which is as follows: "This insurance also specially to cover (subject to free of average warranty) loss of or damage to hull or machinery directly caused by accidents in loading, discharging, or handling cargo, or in bunkering or in taking in fuel, or caused through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull," and then there is a proviso which does not apply to the present case. The construction of various parts of this clause has been the subject of decisions in the Courts; but that of the particular part upon which the plaintiffs first rely has not.

The plaintiffs' case is, first, that upon the true construction of this clause "breakage of shafts" is covered simpliciter, and, therefore, that all that the plaintiffs have to do here is to say that the tail shaft of their steamer broke, and that for whatever reason that may have happened they are entitled to recover. The defendants say that the plaintiffs cannot properly construe this clause as covering breakage of shafts isolated from all the rest of the subject-matter of the clause, but that they must read the clause as a whole, and that when they do so they will find that no such construction can be put upon it. But the defendants go on to say that even if that be a possible construction, still it will not assist the plaintiffs in the present case, because of s. 55, sub-s. 2 (*c*), of the Marine Insurance Act, 1906, it being plain upon the pleadings, and the admitted facts, that this breakage arose through the inherent vice of the shaft itself. The facts with regard to the breakage seem to be plain enough. During the operation of wedging off the propeller the shaft was being subjected to an ordinary operation of repair which any shaft of proper strength and construction would be able to sustain without any difficulty, but, owing to what is described as a "smooth flaw extending downwards from the top as the shaft then lay" deep into the metal, involving about one-half of the material, the other half of the shaft remained and was broken. It is said on the part of the defendants that that is a latent defect, and, except under those words of this clause which deal with latent defects, damage caused by latent defects is excluded from this clause by virtue of s. 55, sub-s. 2 (*c*), of the Marine Insurance Act, 1906. That seems to me to be a sound proposition. Where there are in the policy express words dealing with latent defects and an attempt is made to isolate from that portion of the policy certain other words and to say that they ensure against a particular peril simpliciter, I think that to those words so isolated the general provisions of marine insurance law, as indicated by the section to which I have referred, must be applied and that the words so isolated must be read subject to those conditions of the law. But, as a matter of construction, there is a further answer. It seems to me that to try to isolate these words "bursting of boilers, breaking of shafts" from their context and to read them as if they were taken out from their position and written in immediately after the words in brackets "subject to free of average warranty" so that the clause should read "This insurance also specially to cover (subject to free of average warranty) bursting of boilers, breakage of shafts," is to do such violence to the language of the clause that it is not possible to put such a construction upon it. It seems to me that the words must be read in the position and in the context in which they are found, and, so reading them, one finds that they appear following one set of circumstances introduced by the words "directly caused by," another set of circumstances introduced by the words "or caused through," and themselves introduced by the words "or through." When one looks at them from that point of view, it becomes obvious that they cannot be isolated in the way contended for by the plaintiffs.

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(1) (1923) 16 Ll. L. Rep. 129, 133.

Now the next point that is taken is that if you cannot so isolate them, you may, at all events, read them in the following way: "This insurance also specially covers loss of or damage to hull or machinery through breakage of shafts." It is said that "shafts" are a portion of hull or machinery, being a portion of the machinery, and that loss of or damage to machinery caused through breakage of shafts includes the actual breaking of the shaft itself. That, it seems to me, is a forced construction of the language and not the ordinary meaning which, reading the clause as a piece of English prose, one would be inclined to put upon it. It follows other clauses in which obviously the loss or damage happens to something different from the thing by which the damage is said to be caused. The first clause is "caused by accidents in loading," and so forth; the next is "caused through the negligence of master, mariners," and so forth. Both of those clauses obviously envisage, as it seems to me, a state of affairs in which the main cause produces damage which has an effect on something else; and I see no reason why, when after those two clauses one comes down to the one with which I have particularly to deal, one should read it in any other way. It seems to me, therefore, that the proper reading is that the breakage of the shaft itself is not covered, nor can it properly be said that the breakage of the shaft is a loss of or damage to machinery caused by the breakage of the shaft. The breakage of the shaft is the breakage of the shaft, and if, by reason of the breakage of the shaft, the machine is torn to pieces, then one would get damage caused by the breakage of the shaft. But in this case the only damage beyond the damage to the propeller, which has been paid for, is the actual damage which happened to the shaft itself, to wit, the breakage of the shaft. To speak of that as damage to the machinery which the breakage of the shaft has caused, seems to me to produce a confusion both of thought and language, which I think should not be introduced into the construction of a clause of this kind.

I therefore think the plaintiffs fail to establish a right to recover under that part of the clause which relates to the breakage of shafts.

The plaintiffs say further that there was here a latent defect in the shaft and that the damage arising from breakage of the shaft is damage which has been caused to machinery, to wit, the shaft, by reason of a latent defect in the machinery, to wit, the shaft. In this case the latent defect had proceeded so far from the ordinary wear and tear and use to which a propeller shaft is subjected that it actually resulted in a solution of the continuity of the shaft, and it is said that by reason of that fact this case can be distinguished from the case of *Hutchins Brothers* v. *Royal Exchange Assurance Corporation*. (1) The plaintiffs ask me to say that this curious position arises: That because it is now known that this tail shaft was in such a state owing to this latent defect that had the defect been discovered it would immediately have been appreciated that the tail shaft was only worth what it would fetch as scrap-metal, and because the defect had become so serious that a perfectly ordinary operation had caused the shaft to break in two, the loss is thrown upon the underwriters and they must not only provide a new shaft, but bear the cost of installing it in the ship. If that is the true construction of the policy, effect must be given to it; but I confess that I think it would be wrong to be astute to find reasons for coming to the conclusion that that was the intention of the parties when they entered into this bargain. It seems to me that, although in this case the latent defect had gone so far as to cause a complete severance of the shaft into two pieces, yet all the considerations which were applied in *Hutchins Brothers* v. *Royal Exchange Assurance Corporation* (1) apply equally in the present case. What I have said already in regard to the breakage of the shaft and the necessity of there being some damage caused by the breakage of the shaft other than the breakage of the shaft itself, seems to me to apply also to the case of a latent defect. Damage to hull or machinery caused through a latent defect in the machinery is something different from damage involved in a latent defect in the machinery itself. In the present case, the tail shaft broke owing to a latent defect existing in itself, and, so far as the evidence goes, existing before the underwriters ever came on risk. There is nothing to show that this latent defect developed or came into being during the currency of the policy. The fact that it is spoken of as "an old flaw," whether it had previously been discovered or not, tends to show that it had existed before this policy was taken out. All that has happened is that it has gone on developing, and although the shaft was not subjected to anything in the shape of a peril, but to an ordinary operation of ship repairing, that operation caused its breakage.

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(1) [1911] 2 K. B. 398.

For these reasons I think that the construction put upon this clause by the plaintiffs is not the true construction. I have tried to approach the question without reference to authority, dealing with it strictly as a matter of construction and applying to it my own view of what the language means. It seems to me, however, that all that I have done has been to repeat, probably in much less apt language, what was said by Walton J. in *Oceanic Steamship Co.* v. *Faber* (1), where he was dealing, obiter it is true, with these words as to breakage of shafts. Except that I do not myself entertain the doubt which he felt, I adopt everything that he said in relation to the construction of the clause. He had not to decide this question of construction. If he had had to do so, I beg leave to doubt whether he would have remained in any uncertainty after considering the question from the point of view of one who had to give his decision upon it. His judgment has been cited over and over again with admiration. It is true that when *Hutchins Brothers'* case (2) was before the Court

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(1) 11 Com. Cas. 179, 187; on appeal 13 Com. Cas. 28.
(2) [1911] 2 K. B. 398.

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of Appeal this particular point was not there referred to. It is also true that when the *Oceanic* case (1) went to the Court of Appeal certain of their Lordships there, having stopped counsel who was going to argue this point before them, proceeded, whilst carefully observing that nothing they were about to say should be taken as any authority, to state that they were not convinced of the correctness of Walton J.'s view of this matter. But that, it seems to me, only leaves it completely open to a judge, who has to find—because it is the point in the case before me—what is the true meaning to be applied to this clause, to express his own opinion unfettered by authority. In my view, therefore, this action fails and must be dismissed.

Judgment for defendants.

Solicitors for plaintiffs: *Holman, Fenwick & Willan.*
Solicitors for defendants: *Thomas Cooper & Co.*

(1) 11 Com. Cas. 179; on appeal 13 Com. Cas. 28.

J. R.

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Feb. 10, 11.

Insurance (Motor)—Policy for " social domestic and pleasure purposes " —" Use for hiring " excluded—Third-party risks—Carriage for hire or reward—Liability for injury—Right of indemnity—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *ss.* 35, 36, *sub-s.* 1 —*Road Traffic Act,* 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 10.

A private motor-car policy described the permitted user of the car as " for social domestic and pleasure purposes " and use by the assured in person in connection with his business, excluding use for " hiring."

The insured on an isolated occasion carried two passengers from Manchester to London for a money payment :—

Held, that the policy did not cover risk to persons carried for money payment, even on an isolated occasion.

By the Road Traffic Act, 1930, s. 36, sub-s. 1 (*b*), proviso (ii.), the policy of insurance against third-party risks (prescribed by s. 35) is not required to cover " except in the case of a vehicle in which passengers are carried for hire or reward . . . . liability in respect of the death of or bodily injury to persons being carried in . . . . the vehicle at the time of the occurrence of the event out of which the claims arise " :—

Held, that the exception " in the case of a vehicle in which passengers are carried for hire or reward " is a clause by itself, distinct from the proviso, and is to be so construed. It affects vehicles in which passengers are normally and habitually carried for hire or reward, and does not apply to isolated occasions on which payment is made or consideration given by a passenger.

A passenger therefore who was carried on the occasion mentioned above would have had no right of action against the insurers under the Road Traffic Act, 1934, s. 10, even if the risk had come within the policy.

ACTION before Branson J. without a jury.

The action was tried upon an agreed statement of facts which was as follows :—

" The plaintiff in this action seeks to recover the sum of 235*l.* 2*s.* 10*d.* against the defendants by virtue of s. 10 of the Road Traffic Act, 1934. On September 16, 1935, the plaintiff was a passenger in a motor-car owned and driven on the main road from Dunstable to London by one William Alexander Wilcox. At Markyate the motor-car came into collision with a motor-lorry owned by and in the control of the servants of one Edward Gordon Woodcock, whereby the plaintiff sustained injury. At the time of the collision Wilcox was insured with the defendants under the terms of a policy and certificate of insurance. The material words of the policy were :—

> Description of Use.—Use for social domestic and pleasure purposes and use by the insured in person in connection with his business or profession as stated in the schedule hereto, *excluding* use for hiring. . . .

[The business or profession stated in the schedule was that of company director].

The circumstances in which the plaintiff came to be a passenger in the motor-car at the time of the collision were as follows : The plaintiff and one Hartman had arranged to travel to London by train from London Road Station, Manchester, on the afternoon of September 16, 1935. On the morning of that day Hartman met Wilcox, who told him that he himself was going to London in his car in any event for the purpose of giving evidence on Hartman's behalf in a case in which Hartman was defendant, and that he would take them to London for 25*s.* each. Hartman agreed and subsequently informed the plaintiff of Wilcox's offer and the plaintiff likewise agreed.

It was as a result and in pursuance of this arrangement that the plaintiff came to be riding as a passenger in the motor-car at the time of the collision. The plaintiff and Hartman each paid Wilcox 25*s.* before leaving. This was, so far as known, an isolated transaction, nor was Wilcox in the habit, so far as known, of using his car in this way ; nor had he, so far as known, done so before, and up to this time the plaintiff was a stranger to him. As a result of the collision the plaintiff brought an action against Wilcox and Woodcock, and on January 21, 1936, at St. Albans County Court, recovered a judgment against Wilcox for 78*l.* 18*s.* and costs to be taxed and there was judgment against the plaintiff in respect of the costs of Woodcock to be taxed, which costs were ordered to be paid by the defendant Wilcox. The costs of the plaintiff and of Woodcock have been allowed and taxed at 89*l.* 16*s.* 2*d.* and 66*l.* 6*s.* 2*d.* respectively and there is now a judgment in favour of the plaintiff for 235*l.* 2*s.* 10*d.* which remains wholly unsatisfied. Shortly after the collision and before the issue of the writ in this action—namely, in or about November, 1935, Wilcox claimed to be entitled to indemnity from the defendants in respect of the collision and any claims, including the plaintiff's, arising therefrom; but the defendants disputed Wilcox's alleged right to indemnity and denied that they were under any obligation to indemnify him."

In the proposal form for the policy the proposer described the car as a 4/5 seat saloon Ford. He stated that the car was to be used "for social domestic and pleasure purposes with occasional business calls." The class of risks was Class I., in which the use for hiring was excluded, as also use for trade and business purposes. The premium for Class I. was lower than for Classes II. and III., in which use for trade or business purposes was permitted. The "general exceptions" clause in the policy itself stated that "the company shall not be liable in respect of (1.) any . . . . liability incurred . . . . while any motor-car . . . . under this policy is being used otherwise than in accordance with the 'description of use' contained in this policy."

The certificate of insurance issued under the Road Traffic Acts, 1930 and 1934, also described the limitations for use as "only for social domestic and pleasure purposes, and the policy holder in person in connection with his business or profession."

Gilbert Paull for the plaintiff. The plaintiff is entitled to recover from the insurers by virtue of the Road Traffic Act, 1934, s. 10. (1) The policy excludes in the description of user

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(1) By the Road Traffic Act, 1930:—

Sect. 35, sub-s. 1: "Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor-vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act."

"use for hiring," but in the present case the car was not being used for hiring. It was a vehicle in which the passenger—to quote the Road Traffic Act, 1930, s. 36, sub-s. 1 (*b*) (ii.)—was being "carried for hire or reward." (1) That is not excluded by the policy, which is only intended to exclude the general hiring out of the whole car for the purpose of driving from one place to another. Here the car was being driven by Mr. Wilcox from Manchester to London for his own purposes, and the plaintiff and his friend were merely taken in as extra passengers for a fee. The mere fact of there being a money payment does not constitute a "hiring," and the

Sect. 36, sub-s. 1: "In order to comply with the requirements of this Part of this Act a policy of insurance must be a policy which . . . .

(*b*) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road:

Provided that such a policy shall not be required to cover:—

. . . .

(ii) Except in the case of a vehicle in which passengers are carried for hire or reward . . . . liability in respect of the death of or bodily injury to persons being carried in or upon . . . . the vehicle at the time of the occurrence of the event out of which the claims arise."

Sect. 121: "'Public service vehicle' means a motor vehicle used for carrying passengers for hire or reward other than a vehicle which is a contract carriage within the meaning of this Act adapted to carry less than eight passengers. . . . ."

By s. 61 of the Act of 1930 as amended by s. 24 of the Road Traffic Act, 1934, "express carriages" are defined as public service "motor vehicles carrying passengers for hire or reward at separate fares none of which is less than one shilling or such greater sum as may be prescribed."

The Road Traffic Act, 1934, s. 10, provides: "If, after a certificate of insurance has been delivered under sub-s. 5 of s. 36 of the principal Act to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (*b*) of sub-s. 1 of s. 36 of the principal Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

(1) See note (1) ante, p. 655.

user here was within the terms of the policy. As regards the Act of 1930, s. 36, sub-s. 1 (*b*) (ii.), the exception to the proviso makes it essential to cover the risk to passengers carried "for hire or reward" as did the present policy. The words are much wider than "use for hiring" as used in the policy, and s. 36 applies here, so that the plaintiff can sue the company upon his unsatisfied judgment under the Road Traffic Act, 1934, s. 10. (1)

H. I. P. Hallett K.C. and *F. Soskice* for the defendants. The case raises two questions depending (1.) upon the policy, and (2.) upon the Road Traffic Acts. As to the first, the proposal form and policy, which is for a private motor-car (Class I.), permit user "for social domestic and pleasure purposes," with use by the insured in person in connection with his business, "use for hiring" being expressly excluded by the Conditions. It may be argued that "hiring" includes the carriage of passengers for hire or reward, and that the assured in taking the plaintiff for a fee was travelling outside the Conditions when the accident occurred. But even if the narrower meaning is given to "hiring" and it is confined to the letting out of the whole car, the carriage of passengers for separate payments made by them is outside the limits of user laid down in the policy. Such user would bring the car within the definition of a "public service vehicle" in the Road Traffic Act, 1930, s. 121, sub-s. 1, and s. 61, sub-s. 1, as a "motor vehicle carrying passengers for hire or reward at separate fares." The use for some purposes of a hired car which being adapted to carry less than eight passengers is not a public service vehicle, although a "contract carriage" (e.g., to take a K.C. to a levee), might possibly be thought to come within the description of use for "social domestic and pleasure purposes," and it is probably for this reason that "use for hiring" was excluded in drafting the policy.

Turning to the second question, and assuming that the risk was included in the policy, the plaintiff still cannot recover under the Road Traffic Act, 1934, s. 10. He can only do so if he can show that the Act of 1930, sub-ss. 35 and 36, required

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(1) See note (1) ante. p. 655.

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Mr. Wilcox to have a policy which would cover the risk to the plaintiff for the journey. This involves the construction of s. 36, sub-s. 1 (*b*), proviso (ii.). (1) By the proviso the policy need not cover "except in the case of a vehicle in which passengers are carried for hire or reward" liability for injury to "persons being carried" in the car at the time of the accident. The difference in the language shows that the exception refers to vehicles in which passengers are *normally* and *habitually* carried for hire or reward. It does not apply to isolated cases in which a reward is taken. Sects. 35 and 36 of the Act of 1930 are penal sections, and the Courts will not infer the imposition of a penalty where the intention to impose a penalty is not clearly laid down by the words of the statute. The construction contended for is reasonably clear, whereas a construction to the contrary would greatly increase the number of offences under the section. Where persons "are being carried" on isolated occasions for reward the proviso applies without the exception. No certificate of insurance was required by s. 36 to cover the risk to the plaintiff here, and he has no right of action under the Road Traffic Act, 1934, s. 10.

Paull in reply. The proposal form does not refer to "private user," but is in the same terms as the policy. The policy must be looked at apart from the Act of 1930, s. 36, although the two are not mutually exclusive. No question as to "public service vehicles" here arises, and the exception in s. 36, sub-s. 1 (*b*), proviso (ii.), is not directed to them or to contract carriages. The requirement of the Act of 1930, s. 35, is that there should be a policy in force covering the user at the time of the accident. If the exception to the proviso in s. 36, sub-s. 1 (*b*) (ii.), only referred to vehicles in which passengers are "normally and habitually" carried for hire or reward, words to that effect would have been used. The previous section relates to "user," and s. 36 carries out that by requiring insurance of passengers where the user is for hire or reward. No stress can be laid on the use of the plural—"passengers"—in the exception to the proviso;

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(1) See note (1) ante, p. 655.

the singular number may be substituted for the plural in interpreting an Act of Parliament, and that rule applies here.

BRANSON J. This action raises a short point, and the facts are agreed. [His Lordship referred to the statement of facts and continued:] The only ground on which the defendants now deny their obligation to indemnify the plaintiff is that the policy did not cover the use of the car in the way in which Mr. Wilcox was using it. The plaintiff brings his action under the Road Traffic Act, 1934, s. 10, and in order to recover he must show (1.) that Mr. Wilcox was entitled to be indemnified under the policy in respect of the liability falling on him as a result of this accident, and (2.) that the circumstances were such that Mr. Wilcox was under an obligation under the Road Traffic Act, 1930, s. 36, to have in force a policy covering injury which might be sustained by the plaintiff arising out of the use of the car on the road.

There are thus two questions, the first of which depends on the statute, and the second on the policy. Counsel for the plaintiff has argued that in the circumstances the plaintiff was a passenger for reward, and yet that the car was not excluded from the cover of the policy, because the car was not being used for hiring. If that contention is good, the plaintiff must succeed. Counsel for the defendants, on the other hand, contended that the two positions were mutually inconsistent. He submitted that if the circumstances were such as to bring down on Mr. Wilcox the obligation under s. 36 of the Act of 1930 to have a policy to cover a passenger in his car, that fact must exclude Mr. Wilcox from cover under the policy issued by the defendants. The matter turns on the terms of the documents, to which I must refer. Under the policy, Mr. Wilcox was covered in respect of the use of the car for "social domestic and pleasure purposes" and its use by the insured in person in connection with his business or profession as stated in the schedule thereto, excluding its use for hiring, commercial travelling, and so on.

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Under the general exceptions, if the car was used otherwise than in accordance with the policy, then the policy does not cover it. It appears from the statement of facts that Mr. Wilcox was not in the habit of using the car for carrying passengers for payment, and it is also stated that up to this time the plaintiff was a stranger to him. The question of the interpretation of the policy turns on whether or not one can say that the word " hiring " in the description of use has a strict and restricted meaning so as not to apply to the carrying of a person for reward. It is true that in strictness a person does not " hire " a vehicle in which he is conveyed for payment from one place to another place to which the vehicle would be going in any event. But one must bear in mind the known position as to the liability of persons using cars to procure cover for passengers. It is not right to read a policy issued in order to come within the terms of a statute without looking at the statute, with reference to which it has been issued. If the argument adduced by counsel for the plaintiff is sound, this policy, which is called a " Private Motor Car Policy " and covers the use of a car for social domestic and pleasure purposes, might be extended to cover a person who, for his own pleasure and profit, habitually ran his car from London to Brighton and took fees from persons to be conveyed there. That would not be a " hiring " of the car, but it cannot possibly have been intended by Mr. Wilcox or the insurance company that any such user should be permitted under the policy. It seems to me that the policy, which is for a private car, by the words in the exclusion clause coupled with the words at the beginning of the " description of use " clause, confines the indemnity to use for social domestic and pleasure purposes, that is to say, in the class wherein persons conveyed as passengers are not in a position to make a claim against the insurance company. It would be wrong to hold that the car when used by Mr. Wilcox as it was used on the day in question—that is for carrying passengers for payment from Manchester to London—was being used for social domestic and pleasure purposes and not for hiring. The use of the car for driving two persons to London for a consideration takes it out of "use for social domestic and pleasure purposes." In my view this action must fail on that ground, that the user of the car was not within the policy.

It is therefore unnecessary for me to decide on the other ground, namely the question under the statute, which is rather more difficult; but as the matter has been argued before me, perhaps it would be right for me to express my opinion. The matter depends on the statute. The plaintiff, under the Road Traffic Act, 1934, s. 10, has a right to sue the defendants only if the position was such that, under s. 36 of the Act of 1930, Wilcox was bound to have a policy of insurance which would cover him in respect of this journey. Sect. 36 of the Act of 1930 says (sub-s. 1) that "In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which . . . . (*b*) insures such person . . . . as may be specified in the policy in respect of any liability which may be incurred by him . . . . in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road: Provided that such a policy shall not be required to cover . . . . (ii.) except in the case of a vehicle in which passengers are carried for hire or reward . . . . liability in respect of the death of or bodily injury to persons being carried in or upon . . . . the vehicle at the time of the occurrence of the event out of which the claims arise." It is said that the change in the use of the language in the proviso from "passengers are carried" in the exception, to "persons being carried" in the latter part of para. (ii.), suggests that the proviso deals with what is happening at the moment of the accident, and that the exception to the proviso deals with vehicles normally or habitually used for the carriage of passengers for hire or reward. I may say in passing that the use of the words "hire or reward" in this way seems to help in the construction which I have put on the policy. I fail to see how the Legislature can be thought to have drawn any distinction between "hire" and "reward," and the view that the words were almost synonymous in the Act may well have led to "hiring" only being referred to in the policy. Whichever way one reads the proviso, difficulties arise. If it means what counsel for the plaintiff says it does, one cannot see why the words "unless they are being carried for hire or reward" should not have come in at the end of the proviso, which would have avoided the clumsy exception at the beginning. The result of adopting that construction would be that if any one took a passenger in a car for anything in the nature of a reward, then he would immediately become liable to penalties if he did not have a policy of insurance covering that person. I think that this sub-section is really dealing with vehicles normally or habitually used in the way mentioned in the exception, and that the mere fact that on an isolated occasion a man takes some reward—not necessarily a monetary reward—for the conveyance of a passenger in his car does not render him liable to a penalty for not having an insurance policy covering that passenger on that occasion. Two constructions may be possible, but as this is a penal statute one leans against the construction which would turn the user of the car into a criminal user.

As Mr. Hallett has said, it is possible to see in the form of the language used the distinction between the liability in respect of "persons carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence," which is obviously directed to the moment of the accident, and the case of a vehicle in which passengers "are carried for hire or reward." The words at the commencement of the proviso, "except in the case of a vehicle in which passengers are carried" cannot be read with the words "at the time of the occurrence"; and that being so, I think one must read the exception as a clause by itself and as not joined up to the language at the end of the proviso: "at the time of the occurrence of the event out of which the claims arise." The effect is that, unless this is a vehicle in which passengers "are carried for hire" in the sense in which one would generally use that kind of expression, as for instance "a house in which parties are given " or " a shop in which umbrellas are kept," that is to say habitually given or kept, the proviso applies without the exception and, consequently, upon this ground also the plaintiff would fail.

Judgment for defendants.

Solicitors for plaintiff: *Stanley & Co., for Leslie Weinberg, Manchester.*

Solicitors for defendants: *L. Bingham & Co.*

F. P. F.

C. A.

1936
Nov. 18, 19;
Dec. 18.

BARBER *v.* PIGDEN.

[1935. B. 3128.]

Husband and wife—Tort by wife—Slander—Publication by wife of slander on different dates—Alleged agency of husband—Statute—Retrospective effect—No direction to jury to find verdict on each publication—No objection taken to direction—Verdict for one sum for all publications—Whether valid verdict—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *ss.* 3, 4.

By a writ dated August 16, 1935 (after the coming into operation on August 2, 1935, of the Law Reform (Married Women and Tortfeasors) Act, 1935), the plaintiff, a married woman, sued the defendants, husband and wife, claiming damages in respect of slanders alleged to have been uttered by the female defendant on divers dates in 1934 and in the early months of 1935, the claim as against the male defendant being that he authorized or caused the female defendant to utter the words complained of. The defendants denied the publication, and the male defendant denied that he authorized or caused the female defendant to utter the alleged defamatory words.

At the trial the judge left the case against both defendants to the jury without directing them that if they found for the plaintiff they should return a separate verdict with separate damages in respect of each publication. No objection was taken to this direction at the time. The jury found a single verdict against both defendants and judgment was entered against them accordingly. On appeal:—

Held, (1.) that there was evidence entitling the jury to find that the female defendant uttered the slanders complained of and therefore that the verdict and judgment against her must stand; (2.) that there was no evidence that the male defendant authorized or caused the female defendant to utter the words complained of; (3.) that the Law Reform (Married Women and Tortfeasors) Act, 1935, has a retrospective operation, and by virtue of its provisions the male defendant was not liable for his wife's tort; and (4.) that as no objection was taken at the trial to the jury being asked to consider the different publications as a whole instead of separately, or not being asked to assess separate damages in respect of each publication, the female defendant could not be heard to say that the verdict was a nullity.

Weber v. *Birkett* [1925] 2 K. B. 152, and *Weiser* v. *Segar* [1904] W. N. 93, distinguished.

Principle enunciated by Lord Halsbury L.C. in *Nevill* v. *Fine Art and General Insurance Co.* [1897] A. C. 68, at p. 76, and in *Seaton* v. *Burnand* [1900] A. C. 135, at p. 143, applied.

Per Scott L.J. There is nothing in the Judicature Acts or in the Rules of the Supreme Court that separate verdicts and judgments are invariably necessary in respect of separate causes of action contained in the same writ. The question whether one or more causes of action can be included in one verdict or judgment depends upon the exercise of the trial judge's judicial discretion upon all the circumstances of the case.

Per Scott L.J. The canon against giving a retrospective interpretation to a statute, in the absence of specific provision, expresses no rigid or absolute rule. It does not apply to a statute dealing with procedure, nor, *semble*, does it apply to a statute abolishing old legal fictions.

Appeal of male defendant allowed: appeal of female defendant dismissed. Decision of Talbot J. reversed in part.

APPEAL from a decision of Talbot J. in an action tried with a jury.

The plaintiff, a married woman, claimed damages from the defendants, husband and wife, in respect of slanders alleged to have been spoken of the plaintiff by the female defendant on three different dates in 1934 and the early part of 1935, imputing unchastity to her, on which occasions, the plaintiff alleged, the female defendant was the agent of the male defendant. The writ in the action was issued on August 16, 1935.

The defendants denied the publications, and the male defendant denied that he authorized or caused the female defendant to utter the words complained of if they were uttered by the female defendant.

At the trial it was submitted that there was no evidence that the male defendant had authorized or caused the female defendant to utter the words complained of. According to counsel's note Talbot J. said with regard to this: "Authority would not be satisfied merely by the fact that the husband knew that these stories were being told by the wife. You must be satisfied that there was this campaign . . . . I think it is impossible to say there was no evidence, but you have the important fact that on every occasion where anything definite was said by her before him he did something to check her. Authority must be something in the nature of active authority." The judge therefore left the case to the jury against both defendants, but he did not direct them that if they found for the plaintiff they should find a separate verdict on each of the alleged slanders, nor did he direct them to assess a separate sum of damages in respect of each; he left it to them to find a general verdict covering all the allegations in the statement of claim. No objection was taken at the time on behalf of the defendants to this direction. The jury returned a general verdict for 300*l.* against both defendants, and judgment was entered against both for this amount.

The defendants appealed. The appeal was heard on November 18, 19, 1936.

Carthew K.C. and *A. A. Pereira* for the appellants. First, the verdict found by the jury was a nullity. As is stated in Gatley's Libel and Slander, 2nd ed., p. 772, "in an action against a defendant in respect of two or more libels or slanders alleged in separate paragraphs of the statement of claim, the jury must find a separate sum of damages in respect of each libel and slander; a verdict awarding a lump sum without apportionment between the several causes of action is not a valid verdict, and judgment cannot be entered for either party thereon." For that proposition *Weber* v. *Birkett* (1) is clear authority. In view of the submission that there was no case established against the male defendant, we on his behalf are not precluded from taking the objection now to the direction by the judge in leaving it to the jury to find a lump sum verdict: see per Vaughan Williams L.J. in *Weiser* v. *Segar* (2), and per Sir James Campbell L.C. in *Steele* v. *Belfast Corporation.* (3)

Secondly, there being, as we contend, no evidence showing that the slanders complained of were uttered by the female defendant as the agent, or with the authority, of the male defendant, the latter is, by virtue of the Law Reform (Married Women and Tortfeasors) Act, 1935 (4), which came into

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(1) [1925] 1 K. B. 720; [1925] 2 K. B. 152.

(2) [1904] W. N. 93.

(3) [1920] 2 I. R. 125, 139, 140.

(4) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 3: "Subject to the provisions of this Part of this Act, the husband of a married woman shall not, by reason only of his being her husband, be liable—(*a*) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage; or (*b*) to be sued, or made a party to any legal proceeding brought, in respect of any such tort, contract, debt, or obligation."

Sect. 4: "(1.) Nothing in this

operation on August 2, 1935, and thus before the writ in the action was issued, no longer liable, as such, for his wife's torts. The Act, save to the extent mentioned in s. 4 (*b*), must be given a retrospective operation.

G. O. Slade for the respondent. On the first point made for the appellants that the verdict was a nullity, the decision in *Weber* v. *Birkett* (1), upon which reliance is placed, is no authority for the proposition advanced. That case is only an authority where the different causes of action are of a different genus; in the present case the different causes of action are of the same genus. Time and again actions have been brought in respect of slanders published to various persons on separate occasions, and one verdict has been found without it having been suggested that it was essential to have a separate verdict in respect of each publication. Furthermore, as no objection was taken at the trial to the jury being asked to find a general verdict, the point cannot now be taken that the verdict so found was a nullity.

On the second point, it is to be borne in mind that all the publications of the slanders were before the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935. That being so the Act cannot be read as destroying an accrued right of action in respect of a tort. Such a right is a right of property which is not to be taken away without express words, and there are no express words to this effect to be found in the Act.

Carthew K.C. in reply. With regard to the point sought to be made that the principle of *Weber* v. *Birkett* (1) applies only where the different causes of action are of a different genus, it is to be observed that Bankes L.J. said (2): "The action was brought to recover damages for a slander, and also for a libel, two quite distinct causes of action. I think it only leads to confusion to call attention to the fact that

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Part of this Act shall . . . . (*b*) affect any legal proceeding in respect of any tort if proceedings had been instituted in respect thereof before the passing of this Act."

(1) [1925] 1 K. B. 720; [1925] 2 K. B. 152.
(2) [1925] 2 K. B. 154.

the nature of the defamation was the same in both. That does not make them any the less distinct causes of action." Here there were different slanders raising different causes of action. On the second point, under the Law Reform (Married Women and Tortfeasors) Act, 1935, the relief given to husbands was obviously intended to be wide; and s. 3 is drawn in the widest terms. To entitle the respondent to succeed it would have been necessary for the Act to provide that a husband would not be liable for his wife's torts "committed by her hereafter." The generality of the language of s. 3 of the Act is limited only by s. 4, sub-cl. (*b*), that is, as not affecting "any legal proceeding in respect of any tort if proceedings had been instituted in respect thereof before the passing of this Act."

Cur. adv. vult.

1936. Dec. 18. The following judgments were read:—

GREER L.J. This is an appeal from the judgment of Talbot J. in an action brought by Mrs. Barber against Mr. and Mrs. Pigden under the Slander of Women Act, 1891, which enacts that words spoken and published after the passing of the Act which impute unchastity or adultery to any woman shall not require special damage to render them actionable. The result of this statute was that to impute unchastity to a woman became a tort for which she could bring an action for damages and obtain damages without proof of actual damage. At that time, and until an Act was passed in 1935, a husband was liable to be sued for damages arising from torts or wrongs committed by his wife. In the case under appeal it was not, and could not be, in dispute that the words which the jury found to have been spoken by Mrs. Pigden were such as to impute unchastity or adultery to the plaintiff. Several questions arose for determination by the judge at the trial. It was alleged on behalf of the male defendant that his liability to be sued for the slander was terminated by ss. 3 and 4 of the Law Reform (Married Women and Tortfeasors) Act, 1935. Sect. 3 is in the following words:

"Subject to the provisions of this Part of this Act, the husband of a married woman shall not, by reason only of his being her husband, be liable (*a*) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage; or (*b*) to be sued, or made a party to any legal proceeding brought, in respect of any such tort, contract, debt, or obligation." By s. 4 it was provided that nothing in Part I. of the Act, which is the part material for consideration in the present appeal, should "affect any legal proceeding in respect of any tort if proceedings had been instituted in respect thereof before the passing of this Act." It appears to have been considered by counsel on both sides until a late period in the argument in this Court that the statute last referred to applied retrospectively to liability arising out of torts committed by a wife before the passing of the Act of 1935. It was therefore argued before the trial judge that there was evidence to go to the jury that the female defendant was authorized to make the actionable slander as agent for the male defendant. The defendants on the other hand contended that there was no evidence of such agency fit to be left to the jury, and that the judge ought to have so determined at the end of the plaintiff's case. It was secondly contended on behalf of the appellants that as there were two distinct slanders published on two separate occasions to different persons, there ought to have been a finding by the jury of separate damages in respect of each cause of action, and that inasmuch as the jury awarded one sum, namely, 300*l.*, in respect of both of these two slanders, the verdict was a nullity, and no judgment could be entered in respect of it. The first argument was only concerned with the case in so far as it resulted in a judgment against the male defendant, but both defendants contended that as there was no verdict there could be no judgment against either. As I have said, at a late stage of the arguments counsel for the respondent contended that the decision of the learned judge was right because the liability of the husband for his wife's torts had been put an end to by the Act of 1935 above recited, and it was immaterial whether the wrongful act of the female defendant had been committed before Part I. of the Act of 1935 came into operation. The husband's liability had not been put an end to by the statute on the question whether there was evidence of agency fit to be left to the jury. I have come to the conclusion that the learned judge was wrong in leaving this question to the jury. [The Lord Justice considered the evidence in detail and continued:] In so far as the case depended on making out a case of agency it entirely failed, and the case as against the male defendant should not have been left to the jury.

On the question whether the appellants can complain that the verdict is not a valid one because separate damages were not awarded in respect of each publication of the same slander, reliance was placed by the appellants' counsel on the decision of the Court of Appeal in *Weber* v. *Birkett.* (1) In that case the decision of the Court is correctly stated in the headnote in these words: " The plaintiff sued the defendant for a slander and for a libel. The defendant pleaded an apology, and paid into Court two sums of 105*l.* each, one in respect of the slander and the other in respect of the libel. The jury returned a verdict for a lump sum of 200*l.* to cover both causes of action: Held, that that was no verdict, and that no judgment could be entered upon it for either party." In the Court of King's Bench *Weber* v. *Birkett* (2) was tried before the Lord Chief Justice and a jury. The Lord Chief Justice held that there was no verdict because the two causes of action were of a different genus—namely, one was slander and the other was libel. In giving judgment in the Court of Appeal Bankes L.J. said (3): " The action was brought to recover damages for a slander, and also for a libel, two quite distinct causes of action. I think it only leads to confusion to call attention to the fact that the nature of the defamation was the same in both. That does not make them any the less distinct causes of action." It seems to me that the causes of action for the several publications of

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(1) [1925] 2 K. B. 152.
(2) [1925] 1 K. B. 720.
(3) [1925] 2 K. B. 154.

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defamatory words in 1934 to Mrs. Corke constitute causes of action quite distinct from the several publications of the same defamatory statement to other people in 1935, and that on this ground also there was, as in *Weber* v. *Birkett* (1), no verdict in respect of which judgment could be entered, unless it can be said that the female defendant is disentitled to rely upon this point because she did not ask the judge to leave the questions separately to the jury. It would have caused very considerable inconvenience if the judge in this case had been asked to direct the jury to treat each occasion on which the defamatory words were published by the female defendant as a separate cause of action, and to say what the damages should be in respect of each of the numerous occasions on which she was proved to have repeated the slander. I can quite understand why the defendants' counsel did not ask the judge to take this inconvenient course, but as he stood by and without protest or question allowed the judge to ask the jury to give one verdict in respect of all the occasions on which the defamatory words were spoken, he is, in my judgment, disentitled to take the point that the judge could not act upon the verdict on this ground. I think we ought to act upon the principle enunciated by Lord Halsbury L.C. in *Nevill* v. *Fine Art and General Insurance Co.* (2), where in the course of his speech he said this: "Where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect." The same learned Lord in *Seaton* v. *Burnand* (3) gave expression to the same views. At first sight *Weiser* v. *Segar* (4) seems inconsistent with the views quoted from the speech of Lord Halsbury, but I do not think the question with which Vaughan Williams L.J. dealt in that

(1) [1925] 2 K. B. 152.
(2) [1897] A. C. 68, 76.
(3) [1900] A. C. 135, 143.
(4) [1904] W. N. 93.

case was similar to the question presented by the present case. In the case under appeal it must have been quite obvious to counsel for the defendants that the judge was leaving to the jury all the publications of the slander as if they gave rise only to one cause of action. They may well have thought that this was, from the point of view of their clients, a more convenient and satisfactory way of dealing with the case than splitting it up into several causes of action and asking for a separate award of damages in respect of each.

For these reasons I think the defendants have disentitled themselves to take this second point, and that if this were the only point to be considered the appeal would fail. Further, the trial judge was not asked to take the verdict of the jury as to what their verdict would be in reference to each of the alleged slanders separately. It seems to me that the case is within O. XXXIX, r. 6, and in my opinion there was no miscarriage of justice thereby occasioned. This affords an additional reason why a new trial should not be ordered of the action against the female defendant.

It remains for me to deal with the most important question which was argued in the appeal, that is to say, does the statute of 1935 relieve husbands from their liability for their wives' torts whenever committed, or does such relief only apply to torts committed after the date of the statute? This is a difficult question as regards liability for torts. If s. 3 (*a*) had to be construed without any assistance from s. 3 (*b*) and s. 4, it would probably have to be construed as not retrospective. But s. 3 (*b*) and s. 4, sub-s. 1 (*b*), seem to me inconsistent with such a construction, because if s. 3 applied only to torts committed after August 2, 1935, when the statute came into operation, it would have been quite unnecessary to provide that the Act should not affect any legal proceedings in respect of any tort if proceedings had been instituted in respect thereof before the passing of the Act, because in the event referred to the husband would not have been liable in any case whether proceedings had or had not been commenced because the tort relied upon in any proceedings instituted before the passing of the Act must necessarily have been a tort committed before the passing of the Act. Notwithstanding the strong presumption against construing statutes as retrospective, I cannot resist the conclusion that by reason of the words used in s. 3 (*b*) and s. 4, sub-s. 1 (*b*), this statute ought to be construed as putting an end to the liability of the husband for his wife's torts whenever committed unless legal proceedings had been started before the passing of the Act. It is hardly necessary for me to say that I accept the law as laid down in Maxwell on the Interpretation of Statutes, 7th ed., p. 186, where it is stated that statutes "are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended." This is a firmly established rule, and it would be pedantic to refer to the many cases in which it has been laid down, but I have been forced to the conclusion that s. 3 (*b*) and s. 4, sub-s. 1 (*b*), show that a retrospective effect was clearly intended. The respondent's contention on this point fails.

On the ground that there was no evidence of agency fit to be left to the jury the appeal of the male defendant will be allowed with costs, but as the female defendant has failed on the only point that has been argued on her behalf, her appeal will be dismissed with costs.

SCOTT L.J. This action as originally framed in the writ, which was issued on August 16, 1935, and in the statement of claim as delivered on October 30 of that year, joined a husband and wife as co-plaintiffs in respect of several causes of action for separate slanders spoken on different occasions and published to different people, against two defendants, husband and wife. The slanders constituting the causes of action sued on were stated in para. 3 of the original statement of claim to be (1.) of the male plaintiff, imputing to him dishonesty in his business of a builder, and (2.) of the female plaintiff, imputing to her unchastity, uttered and published on various occasions during the years 1934 and 1935 at Biggin Hill, Kent. The alleged defamations of the male plaintiff were wholly unconnected with those upon the female plaintiff, and on a summons complaining that such a joinder of parties and causes of action was improper, Talbot J. on December 13, 1935, put the then plaintiffs to their election as to which they should go on with and which should be struck out from the action, with consequential directions as to amendment of the statement of claim. This election was exercised by the male plaintiff electing to be struck out, but before any amended statement of claim was delivered he died. After his death an amended statement of claim was delivered on December 30, 1935; in it the allegations relating to him were struck out, the alterations appearing in red ink in the copy before us. A comparison of the original allegations in black ink, so struck out, with the retained allegations of slanders upon the female plaintiff, shows conclusively that the former were separate from and unconnected with the alleged slanders upon the female plaintiff's chastity; and from the point of view of proof of the latter, were irrelevant.

The words of the alleged slanders of the female plaintiff are set out in para. 2, sub-paras. A, B and C, of the amended statement of claim. It will be seen that although they have a generic similarity in that all impute unchastity, they are legally speaking wholly and entirely separate causes of action; and further that in sub-para. C an additional and particular slander affecting the paternity of the plaintiff's son is alleged.

In every case all the words set out are alleged to have been uttered by the female defendant and by her alone. The only allegation against the male defendant is (*a*) that he was present and heard his wife, and (*b*) that he *caused* her to speak and publish the words set out in those three sub-paragraphs. In para. 3 it is further alleged that he "caused the female defendant to speak and publish" the particular words alleged in para. 2 (*c*) on repeated occasions in the previous twelve months: but this is an insufficient pleading of a slander in that the actual words are not set out, and I disregard it.

The above allegation that the words were uttered in the presence and hearing of the male defendant can have no place in a statement of claim for slander except as an allegation of publication to him, and may be disregarded—of course, without prejudice to evidence of the fact if relevant for purposes of proof. The addition that he "caused" her to publish the words is presumably to be construed as alleging a joint tort. Agency of the wife for the husband not being alleged, I do not think that as the statement of claim stood before delivery of particulars it disclosed any cause of action against the husband except in the allegation that he "caused" her to utter such slander, with the result that both would be joint tortfeasors. The defendants might have asked for particulars of how, etc., the husband had so *caused* the wife to do it; but no such request was made, and on the correspondence which passed between the solicitors to the parties it is plain that the defendants' solicitors treated the statement of claim as intended only to allege authority to the wife from the husband to do what she did. This being so, we must treat the allegation of liability of the husband as depending on (sub-para. A) adequate allegations in the further and better particulars of (i.) antecedent authority from the husband to the wife, or (ii.) her *purporting* to speak for him as well as herself, coupled with allegations of contemporaneous or subsequent ratification by the husband; and (sub-para. B) adequate proof at the trial of the allegations in sub-para. A.

The further and better particulars appear on pp. 5 and 6 of the bundle of pleadings under date January 24, 1936. No allegation of express authority is made, but only of an authority to be inferred from certain facts—namely, (*a*) that the husband, though present on all the occasions of the said publications, did not dissent from any; (*b*) that the wife in his presence spoke and published the two slanders upon the deceased Mr. Barber which had been struck out from the original statement of claim when he elected to drop out; and (*c*) that on the last mentioned occasion he had added the words: "Oh yes, that is right." Of these allegations of implied authority (*c*) is the only one which could properly speaking stand; the defendants could have had the others struck out as irrelevant and embarrassing; but they did not do so. On March 7, 1936, the plaintiffs' solicitor by letter

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added a further paragraph to their previous particulars of authority; it was that on the occasion of the slander alleged in para. 2, sub-para. B, of the statement of claim the Mr. Eastwood there mentioned had said to the male defendant: "Oh yes, we know all about the Barbers, don't we, Arthur?," and that the latter had replied: "Yes, we do." All allegations were denied in each defence. On these pleadings the case came to trial before Talbot J. and a common jury on March 16 and 17, 1936.

The Law Reform (Married Women and Tortfeasors) Act, 1935, came into force on August 2, 1935, which was a fortnight before the issue of the writ in this action. The effect of the Act I will discuss later.

The slanders of the plaintiff by the female defendant were amply proved, and counsel for the appellants made no point before us upon that aspect of the trial. The questions raised on the appeal concerned (i.) the form of the judgment, (ii.) the submissions of the defendants' counsel, both before and after the evidence for the defendants, that there was no case to go to the jury as against the male defendant, and (iii.) the interpretation of the new Act. I will discuss them after considering the evidence as recorded in the learned judge's note.

[The Lord Justice then discussed in detail the evidence given at the trial, and came to the conclusion that the jury should have been directed to find a verdict for the male defendant on the ground that there was no evidence that he either caused or authorized his wife to defame the plaintiff; he then continued:] There is, however, a further question, a question of pure law. Mr. Slade, for the plaintiff, submits that the male defendant is none the less liable on the ground that the old common law rule of liability of the husband for the torts of the wife still applies to the torts of a wife committed before August 2, 1935, the date when the new Act first came into effect. Sect. 3 is in the following terms: "Subject to the provisions of this Part of this Act, the husband of a married woman shall not, by reason only of his being her husband, be liable—(*a*) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage: or (*b*) to be sued, or made a party to any legal proceeding brought in respect of any such tort, contract, debt, or obligation." Prima facie, the male defendant is protected from his old common law liability by both (*a*) and (*b*) of the above section. But Mr. Slade submitted that in the absence of express words saying that these provisions are both to apply to torts committed *before* the coming into effect of the Act, they should be construed as restricted to torts committed *after* that date. He based his submission on the canon of statute interpretation that unless you can collect from the language of the statute a clear intention to give it a retrospective operation, even to the extent of taking away vested rights, you must read it as applying only to the future. He then addressed to us a forcible argument to this effect: (i.) Sect. 3, paragraph (*a*), does not say "whether before or after the passing of this Act"; (ii.) nothing short of words to that effect will suffice to take away accrued rights; especially as these words could so easily have been added if Parliament had so intended; (iii.) that Parliament had the subject of retrospective operation well in mind, and expressed itself unambiguously when it intended to say anything which would make the question of dates material is clearly shown by s. 4, sub-s. 1 (*b*): "Nothing in this part of this Act shall . . . . affect any legal proceeding in respect of any tort, if proceedings had been instituted in respect thereof before the passing of this Act." Therefore, says Mr. Slade: (iv.) It would be wrong to attribute retrospective effect to s. 3.

I do not, however, think this argument is sound. The language of Part I. discloses an intention to make a clean sweep of the old legal fiction of our common law that a woman on marrying became merged in the personality of her husband, and ceased to be a fully qualified and separate human person. The draftsmanship of the Act does indeed seem to the lawyer a little open to criticism—and possibly even to more criticism than my common law mind is likely to discern on a first consideration—particularly in regard to the difficult task of connecting the Act up with the retained parts of the 1882 Act; at any rate, Sir Arthur Underhill's delicious little book on the Act just published raises a good many points which call for reflection. But as far as the present case is concerned, the dominant intention of the Act is clear beyond all doubt: it is to effect a drastic reform of our law in a branch where there has been too much legal fiction and too much technicality of legal procedure; and I do not think the rule against retrospective interpretation, on which Mr. Slade relies, is properly applicable to such a statute abolishing legal fictions any more than to a merely procedural statute. The purpose of Part I. of the Act is to give back to a woman, though married, the full human status allowed by the common law to a man, a maiden or a widow, of which the common law had robbed her; in short, it restores to her her natural status and capacity. It does it by sweeping away a host of legal fictions—fictions which in origin were inextricably mixed up with old procedural law. It is well recognized that the canon against retrospective interpretation does not apply to a statute dealing with adjective law, i.e., procedure, and I think that a statute abolishing old legal fictions is so nearly akin to a procedural statute that the canon can have little, if any, application. After all, the canon expresses no rigid or absolute rule. It rests on a presumption of common-sense in a well-ordered and civilized society; and that presumption does not seem germane to the root-and-branch view Parliament was obviously taking when it passed this Act, of the historical interferences by lawyers with the natural rights of woman. Anyhow, the inhibition of the rule is a matter of degree, and must vary secundum materiam. A little consideration of this statute in my view suffices to exclude the presumption altogether.

(i.) The dominant enactment is contained in s. 1. Sects. 2, 3 and 4 are in essence consequential on s. 1, and must therefore be construed in the light of s. 1. (ii.) Sect. 1 obviously calls for a liberal and broad application: why not s. 3 also? (iii.) Where it was intended to impose upon the operation of

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the statute limitations of date, Parliament did it in express words. There are several references to limiting dates in ss. 2 and 4, but none in s. 3; (iv.) The express provision in s. 4, sub-s. 1 (*b*), upon which Mr. Slade relied, leads, in my opinion, to precisely the opposite inference to that which he invited us to draw. Sect. 3 (*b*) provides that (subject to other provisions in the Act) a husband shall not, by reason only of his being her husband, be liable to be sued in respect of any tort committed by her at any time; but that is subject to s. 4, sub-s. 1 (*b*), which creates one exception—namely, where the "proceeding" in which the husband is being sued for a tort of his wife's was instituted before the passing of the Act. But to that express exception the canon of interpretation contained in the maxim expressio unius, exclusio alterius is surely applicable; where the expressed exception is inapplicable, there is no room to imply any other, and consequently s. 3 must apply to every action started after August 2, 1935. I therefore decide that the old common law rule is not available to the plaintiff in this action so as to create a cause of action against the male defendant, and as, if I am right in what I have already said, there is no other ground of liability, he is entitled to judgment.

There is, however, one other matter to be considered—a submission on behalf of the female defendant that there was a defect in the verdict and consequent judgment entered below, which entitles her to a new trial. It arises in this way: There were in the statement of claim three specific and properly pleaded slanders, each quite separate from the other in regard to the words which were uttered, to the occasions when they were uttered, and to the persons to whom they were published. For the purpose of discussing this last point I disregard entirely the allegations in the statement of claim that there were other slanders, the words of which are not set out as they ought to have been, and limit myself to the three which were sufficiently alleged. Each of these three constituted a separate cause of action, and it was contended before us that each of these called for a separate verdict and separate judgment. Very scanty information was available to us of any discussions which took place between counsel and judge at the end of counsel's speeches, and before the summing-up, or after it and before judgment; in fact, the passage I have already quoted from counsel's note is all we know even of the summing-up, except that the learned judge did not direct the jury to find a separate verdict on each of the three slanders, with a separate sum of damages upon each slander for which they returned a verdict for the plaintiff, but left them free to give a lump sum verdict covering the whole statement of claim. The defendants' counsel, as I have already said, submitted that there was no evidence to go to the jury against the male defendant; but he admitted that he took no objection to the summing-up. The jury responded by returning a single verdict of 300*l*. The learned judge thereupon, without objection from the defendants, entered judgment for that sum. Thus no objection was taken to the validity either of the verdict or of the judgment.

Before us, however, Mr. Carthew submitted for both appellants that this procedure was wholly out of order, and so much so that there was in law no verdict and no judgment. He relied upon the case of *Weber* v. *Birkett* (1), and in particular on the observations of Bankes L.J. The decision in that case was that the absence of separate judgments on the two causes of action sued on made it impossible to give the defendant the advantage to which he was entitled of his two separate payments into Court, one in respect of the slander and the other in respect of a libel. The Lord Chief Justice, indeed, had refused to enter judgment, holding that a verdict covering both causes of action in one figure was no verdict. Bankes L.J. agreed with the view taken by the Lord Chief Justice that there was no verdict. Scrutton L.J. said (2): "I think the jury failed to find a verdict on the different issues on which it was necessary for them to find, and therefore the verdict was no verdict." Atkin L.J. said (2): "When once the jury were discharged without coming to a verdict on the issues joined between the parties, it seemed to me that the learned judge could not have acted otherwise than as he did."

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(1) [1925] 2 K. B. 152, 154, 156.

(2) Ibid. 157.

I think that all the Lords Justices had the issue of payment into Court primarily in mind; but Atkin L.J. expresses himself in language which rather reads as if in addition he was thinking of the question of verdict and judgment in relation to the underlying issues of liability on the causes of action; and Mr. Carthew relied upon the decision, or at any rate upon the opinions expressed, as authority for the proposition that where two or more causes of action are joined in one writ there must ex debito justitiæ be separate verdicts and judgments.

In order to see what is the real meaning of the relevant passages in the judgments, it is necessary to look back a little to get the true historical perspective. Under ss. 70 to 73 of the Common Law Procedure Act, 1852, it was necessary for a defendant, if he paid money into Court in satisfaction of part of the plaintiff's claim, to specify the cause of action in respect of which it was paid in. The issue was then raised whether or not the sum paid into Court was sufficient to satisfy the plaintiff's claim, and if that issue were found for the defendant he was entitled to judgment and his costs. Consequently, where two causes of action were joined in one suit, as they could be under s. 41 of the Common Law Procedure Act, 1852, and money was paid into Court in satisfaction of one or each of them, the express terms of the statute required that a verdict should be found in respect of each of the causes of action, in order that judgment might be given in accordance with the Act.

When the Judicature Act was passed this specific statutory provision disappeared; but the requirement in regard to payment into Court that a defendant should state the cause of action in respect of which his payment-in was made re-appeared in O. XXII., r. 2, which until its amendment in 1933 was in the following form: "Payment into Court shall be signified in the defence, and the claim or cause of action in satisfaction of which such payment is made shall be specified therein." Consequently, under the rule in that form, a payment into Court which did not specify in respect of which of several causes of action joined in the same writ it was paid in was a bad plea: see *James Tucker S.S. Co.* v. *Lamport & Holt* (1), where the judgment of Cozens-Hardy L.J. is very explicit. It is important to note, as was pointed out by the Court of Appeal in *Powell* v. *Vickers, Sons & Maxim, Ld.* (2), that in spite of the Common Law Procedure Act having been repealed, the rule that the defendant would be entitled to his costs (although no longer to his judgment) ought still to be applied by the Court.

It is clear from the judgment of Bankes L.J., which was the only long judgment given in *Weber* v. *Birkett* (3), that his mind was directed entirely to the position which arose from the fact that in that case there had been a payment into Court. It is quite true that at one stage he says, " In my opinion that was no verdict at all," but in his very next sentence he draws attention to an argument which was addressed to him that the defect could be cured by an amendment to the defence saying that the sum paid in was paid in generally in respect of both of the causes of action. In dismissing that argument he does so, not on the ground that nothing could make what was " no verdict at all " into a verdict, but upon the technical ground, based on the existing old form of O. XXII., r. 2, that an amendment paying a sum of money in generally in respect of two causes of action would be a bad plea. When he says " there was no verdict at all," he is only saying it was not a verdict which, having regard to the issues raised between the parties on the pleadings as a result of the payment into Court, disposed of the case. Further, it is to be observed that in discussing the judgment of Darling J. in *Benning* v. *Ilford Gas Co.* (4), where a lump sum was paid into Court in respect of several causes, Bankes L.J. said obiter (5): " It may be that the Court were right in dismissing the appeal, having regard to the fact that the plaintiffs allowed the case to go to trial without taking any objection to the payment into Court." That observation is not consistent with the view that the absence of a separate verdict on each of several causes of action included in a statement of claim made the trial a nullity. It is, however, consistent with the view that a single verdict may validly dispose of an action in which several causes of action are alleged, unless the parties by their pleadings or their conduct of the action have rendered it essential that there should be more than one verdict in order that justice between the parties may be done.

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(1) (1906) 23 Times L. R. 10.
(2) [1907] 1 K. B. 71.
(3) [1925] 2 K. B. 152.
(4) [1907] 2 K. B. 290.
(5) [1925] 2 K. B. 156.

The judgment of Scrutton L.J. in *Weber* v. *Birkett* (1) is very short. He, too, had the question of payment into Court primarily in mind. The judgment of Atkin L.J. must, I think, be read in the light of what the Court of Appeal said in *Powell's* case (2)—namely, that wherever money is paid into Court with a denial of liability " there are two issues raised, namely (*a*) whether the defendant is under any liability to the plaintiff, and (*b*) whether the sum paid in is sufficient to cover the liability " ; whilst where money is paid in in satisfaction of the claim without such denial, the only issue joined between the parties is whether or not the sum paid in is sufficient to satisfy the liability. As already pointed out, under the form of O. XXII., r. 2, at that time, the sum had to be allocated to specific causes of action, so that " the issues joined between the parties," to which Atkin L.J. refers in his judgment, were issues which arose from the fact of payment into Court, and his judgment does not necessarily apply to a case where no money has been paid in.

Apart from *Weber* v. *Birkett* (1), which is, for the reasons I have given, distinguishable, and does not govern our decision, I can see nothing in the Judicature Act or Rules of the Supreme Court as they are to-day to make separate verdicts and judgments invariably necessary in respect of separate causes of action contained in the same writ. Indeed, O. XXII., r. 1, sub-r. 2, as it is now worded, expressly contemplates the Court or a judge having power to allow a payment into Court in respect of more than one cause of

(1) [1925] 2 K. B. 152.

(2) [1907] 1 K. B. 71.

action. The result is that the question whether one or more causes of action are to be included in one verdict or judgment will depend upon the exercise of the trial judge's judicial discretion upon all the circumstances of the case.

It is worthy of note that in this particular case the plaintiff, having chosen to join separate causes of action in one statement of claim, asked, not for separate damages in respect of each slander, but for general damages in respect of all the slanders. The jury gave her damages in the manner in which she had prayed for them, i.e., generally in respect of all the slanders. In the absence of any protest by counsel for the defendants at the trial, I do not think it is open to the defendants or either of them to complain now. I cannot see that they thereby suffered any hardship in fact; but in any event the right to object, if any, was lost by waiver.

In the result, I agree with Greer L.J. in the whole of his judgment.

Greer L.J. Eve J. has read the judgments which have just been delivered, and agrees with their conclusions, for the reasons stated in those judgments.

Male defendant's appeal allowed; female defendant's appeal dismissed.

Solicitor for appellants: *W. A. Jennings.*
Solicitors for respondent: *Cosmo Cran & Co.*

J. S. H.

NATIONAL MORTGAGE AND AGENCY COMPANY OF NEW ZEALAND, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

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Jan. 25, 26, 27, 28; *Feb.* 11.

Revenue—Income Tax—Business carried on in New Zealand by company —Company controlled in the United Kingdom—Relief from double taxation—Sum on which granted—Finance Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 27, *sub-s.* 1.

Where in any year income tax has been paid in the United Kingdom and in a Dominion in respect of the profits of a business carried on by a company in the Dominion, then for the purpose of computing the amount in respect of which relief from United Kingdom income tax is granted by s. 27, sub-s. 1, of the Finance Act, 1920, the amounts of the assessable income in respect of these profits in the two countries must be ascertained and relief be granted on the whole or such part of the assessable income in the United Kingdom as is equal in amount to the assessable income in the Dominion without regard to differences of allowances or deductions for expenses made in the two countries in arriving at the assessable income.

Assam Railways & Trading Co. v. *Inland Revenue Commissioners* [1935] A. C. 445 discussed and applied.

When, however, the sum paid by the company in respect of debenture interest is under the law of the Dominion excluded from the assessable income, but the company pays the income tax in respect of it as agent for the debenture holders, relief must also be granted on the amount of the debenture interest so paid without regard to how the tax on the debenture interest is ultimately borne.

Appeal from the decision of Finlay J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Special Commissioners held on December 8, 1931, the National Mortgage and Agency Company of New Zealand (hereinafter called " the company ") claimed relief in respect of New Zealand income tax under the provisions of s. 27 of the Finance Act, 1920, for the years ended April 5, 1925, to April 5, 1931. The claims for the two years to April 5, 1929, were alone dealt with, it being agreed that the decision upon the claims for these years should be applied to the other years.

The company was incorporated in England under the Companies Acts with an authorized capital of 1,500,000*l.* in

125,000 ordinary shares of 10*l.* each and 250,000 preference shares of 1*l.* each. The company had from time to time issued debentures at varying rates of interest, secured upon the uncalled capital of the company. The amount of the debentures outstanding on September 30, 1927, was 782,275*l.* 9*s.* 9*d.*

The company, which was controlled in the United Kingdom, was a finance company, and its business mainly consisted in lending money in New Zealand on mortgages and short loans, generally secured on farm chattels and on land. By far the greater part of the company's income arose in New Zealand, chiefly from the interest on these loans.

The company owned some real property in New Zealand, being premises occupied by it for the purposes of its business. It also had an investment in New Zealand War Loan, investments in ordinary and preference shares in New Zealand companies, and investments in the United Kingdom, the income from which was subject to deduction of United Kingdom income tax at the source. The company was assessed to income tax in the United Kingdom under Sch. D, and in computing the amount of the liability under Case I. of that Schedule the debenture interest paid by the company was not allowed as a deduction from the profits, and was consequently included in the assessment to the United Kingdom tax.

Income tax was imposed in New Zealand by the Land and Income Tax Act, 1923, of which the following were the material sections :—

Sect. 2 : " . . . . " Assessable income " means income of any kind which is not exempted from income tax otherwise than by way of a special exemption expressly authorised as such by this Act : . . . . " Taxable income " means the residue of assessable income after deducting the amount of the special exemptions to which the taxpayer is entitled."

Sect. 72 : " (1.) Subject to the provisions of this Act, there shall be levied and paid for the use of His Majesty in and for the year commencing on the first day of April, 1924, and in and for each year thereafter a tax herein referred to as income tax.

(2.) Subject to the provisions of this Act, such tax shall be payable by every person on all income derived by him during the year preceding the year in and for which the tax is payable.

(3.) The year in which income is so derived is in this Act referred to as 'the income year' and the year in and for which income tax is payable is in this Act referred to as 'the year of assessment.'"

Sect. 73: "(1.) Income tax shall be assessed and levied on the taxable income of every taxpayer at such rate or rates as may be fixed from time to time by Acts to be passed for that purpose.

(2.) The Act by which the rate of income tax is so fixed for any year is in this Act referred to as 'the annual taxing Act.'"

Sect. 74: "(1.) From the yearly assessable income of every person other than a company or an absentee, there shall for the purpose of assessing income tax on that income be deducted by way of special exemption the sum of 300*l.* diminished at the rate of 1*l.* for every pound of the excess of that income over 600*l.*, ...

(2.) 'Absentee' means, in this Part of this Act, a person whose home has not been in New Zealand during any part of the income year."

Sect. 78: "The following income shall be exempt from taxation:— . . . .

(*g*) Dividends and other profits derived from shares or other rights of membership in companies, other than companies which are exempt from income tax:

(*h*) Income derived by a person who is not (within the meaning of this Part of this Act) resident in New Zealand, from stock or debentures which have been issued by the Government of New Zealand, or by any local or public authority, or by the Public Trustee acting as the agent of a land settlement association under the Land Settlement Finance Act, 1909, and the interest on which is payable out of New Zealand:

(*i*) Income derived by the trustees of a superannuation fund: . . . .

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(*m*) Income expressly exempted from income tax by any other Acts to the extent of the exemption so provided."

Sect. 79: " (1.) Without in any way limiting the meaning of the term, the assessable income of any person shall for the purposes of this Act be deemed to include, save so far as express provision is made in this Act to the contrary, ...

(*g*) All interest, dividends, annuities and pensions . . . ."

Sect. 80: " (1.) In calculating the assessable income derived by any person from any source no deduction shall be made in respect of any of the following sums or matters: . . . .

(*h*) Interest, except so far as the Commissioner is satisfied that it is payable on capital employed in the production of the assessable income."

Sect. 83: " (1.) When any land in which a taxpayer owns an interest, or any portion of such land, has throughout the income year or any portion thereof been actually used by the taxpayer exclusively for the purposes of his business or for the purpose of deriving rent, royalties, or other profits therefrom, he shall be entitled by way of special exemption to deduct from the assessable income derived by him during the income year, so far as derived from such use of the land a sum computed in respect of the period of such use at the rate of five per centum per annum on the capital value for the time being of his interest in the land or in the portion thereof so actually used by him, as the case may be, and income tax shall be assessed and payable accordingly."

Sect. 84: " (3.) Subject to the provisions of this Act, no income which is neither derived from New Zealand nor derived by a person then resident in New Zealand shall be assessable for income tax."

Sect. 99: " (2.) If the Commissioner is satisfied with respect to the holder of any debenture or debentures issued by any local or public authority or by any company that the aggregate amount of income tax paid or payable by or on behalf of the debenture holder (including the tax paid in respect of interest on debentures) exceeds the amount of tax that would have been payable by him if the interest received by him on those debentures had formed part of his taxable income, the

Commissioner shall, on application by the taxpayer, pay to him the amount of the excess."

Sect. 116: "(1.) Save as otherwise provided in the next succeeding section every company which has issued debentures, whether charged on the property of the company or not, shall for the purposes of this Act be the agent of all debenture holders, whether absentees or not, in respect of all income derived by them from those debentures, and shall make returns and be assessable and liable for income tax on that income accordingly.

(2.) No deduction by way of special exemption or otherwise shall be allowed to the company as such agent, or to any debenture holders, in respect of the income so derived from debentures.

(3.) Income so derived by debenture holders in companies shall be assessable and chargeable with income tax separately from income derived by the debenture holders from other sources, and at the rate prescribed by the annual taxing Act as appropriate to income so derived.

(4.) Income derived from debentures held by a banking company shall not be liable to income tax under this section."

Sect. 130: "Where an agent pays any tax he may recover the amount so paid from his principal, or may deduct the amount from any money in his hands belonging or payable to his principal."

Sect. 170: "Every contract, agreement or arrangement made or entered into, whether before or after the coming into operation of this Act, shall be absolutely void in so far as, directly or indirectly, it has or purports to have the purpose or effect of in any way altering the incidence of land-tax or income-tax, or relieving any person from his liability to pay such tax."

Sect. 171: "(1.) Nothing in the last preceding section shall be so construed as to render void any contract, agreement, or arrangement made or entered into by any company (whether before or after the coming into operation of this Act) to the effect that the interest on any debentures issued by that company shall be free of income tax; and all such contracts, agreements, and arrangements are hereby declared to be valid and effective in accordance with this section unless the company is expressly or implicitly prohibited, by its memorandum and articles of association from making or entering into any such contract, agreement, or arrangement.

"(2.) When any debentures issued by a company purport to be issued free of income-tax the company shall be liable for the payment of the income-tax payable in respect thereof, and the debenture-holders shall be entitled to receive the full amount of interest payable pursuant to the debentures."

In computing the assessable income of the company for the New Zealand tax a deduction had been allowed under s. 80, sub-s. 1 (*h*), for the interest on so much of the debenture capital as had been employed in the production of the assessable income. The amount of interest so deducted was 37,861*l.* for the year to September 30, 1926, and 34,779*l.* for the year to September 30, 1927, out of the total debenture interest paid by the company of 40,261*l.* and 39,322*l.* for those years. There were also deducted under s. 83, sub-s. 1, the sums of 9999*l.* and 9998*l.* by way of special exemption as representing 5 per cent. of the value of the land owned by the company and used by it for the purpose of the business.

The dividends from New Zealand companies, the interest on New Zealand War Loan, and certain income earned in London were excluded from the assessable income.

The computation for the year 1927/1928 resulted in a loss and no New Zealand income tax was payable direct by the company for that year in respect of its assessable income.

The computation for the year 1928/1929 showed an assessable income of 26,592*l.*, on which the New Zealand income tax payable was 5983*l.* 4*s.*

The computation of the company's profits for assessment to United Kingdom income tax differs in several respects from the computation for the purposes of New Zealand income tax by reason of the above-mentioned enactments and in other respects, e.g., in the allowance for bad debts.

The company's investments in New Zealand companies consisted almost entirely of ordinary and preference shares in a company which may be referred to as X. X was assessed to

New Zealand income tax on its profits, and the dividends paid to the company were not again assessable to New Zealand income tax in the company's hands. No New Zealand tax was deducted by X from the preference dividends and the Crown contended that the company had not paid New Zealand tax in respect of these preference shares. It was admitted that the company had paid New Zealand tax on the dividends on the ordinary shares which it held in X.

The company was also assessed as agent in New Zealand for its debenture-holders for each of the two years in respect of the debenture interest applicable to New Zealand. The tax was in the first place charged on the company at full rates appropriate to the respective debenture-holders as shown by the revised notices of assessment dated August 20, 1929. The interest on the debentures being payable under a contract made in the United Kingdom, the company had no power to deduct and did not in fact deduct any New Zealand income tax therefrom, notwithstanding that it had been assessed to and had paid that tax as agent for the debenture-holders.

Computation was made on behalf of the company of the relief which it claimed to be due in respect of New Zealand income tax and computations were made on behalf of the Commissioners of Inland Revenue showing no relief to be due. The items in dispute were :—

(1.) The debenture interest applicable to New Zealand.

(2.) The allowance of 5 per cent. on the value of the land owned by the company and used by it for the purposes of its business.

(3.) The dividends on preference shares of X from which no New Zealand tax had been deducted.

(4.) The New Zealand War Loan interest.

The Crown admitted the claim to relief in respect of the dividends on the ordinary shares of X.

It was contended on behalf of the company :—

(1.) That the relief must be based on the amount of the income as computed for the purpose of the United Kingdom tax, and that the method by which the New Zealand assessment was computed and the deductions allowed in arriving at that assessment were immaterial.

(2.) That accordingly the fact that the debenture interest applicable to New Zealand and the allowance of 5 per cent. on the land owned by the company and used in its business were allowed as deductions in computing the New Zealand assessment should not be taken into account and the relief should be allowed on the United Kingdom figures without any deduction for these two items.

(3.) That X, having paid New Zealand income tax on the profits out of which its preference shares were paid, the company should be allowed relief on those dividends.

(4.) Alternatively (as regards the debenture interest) the company, having paid New Zealand tax thereon as agent for the debenture-holders and having been obliged to bear this tax, was entitled to relief in respect of the tax so paid.

It was contended on behalf of the Crown :—

(1.) That the company had not paid any New Zealand tax direct in respect of its assessable income.

(2.) That the New Zealand War Loan interest, the debenture interest, and the allowance of 5 per cent. on the value of the land had been specifically excluded and exempted from the subjects of taxation in New Zealand and had not borne tax in New Zealand as part of the company's profits, and that consequently no relief was due thereon.

(3.) That no New Zealand tax had been paid by the company on the preference dividends from X, and therefore no relief was due thereon.

(4.) That on the alternative contention the company was only assessed to tax on the debenture interest as agents for the debenture-holders and this tax was not paid by the company on its income.

The Commissioners gave the following interim decision :—

The main question in this case is on what part or parts of the income of the appellant company has New Zealand income tax been paid.

The appellant company contends that it has paid New Zealand income tax on the whole of its profits arising from its business in New Zealand, while the Crown contends that it has only paid New Zealand income tax on its profits from its business in New Zealand less the profits applied in payment of its debenture interest for which allowance has been made in calculating its business profits under s. 80, sub-s. (*h*), of the Land and Income Tax Act, 1923.

It was argued on behalf of the appellant company that the whole of New Zealand income was income from one source, and that in determining the part of the income on which relief is allowable regard must be had to the source from which it is derived and not to its amount.

In support of this argument reliance was placed on a dictum of Warrington L.J. in *Rolls Royce, Ld.* v. *Short*. (1). It must, however, be observed that in that case the Court was only concerned with English income as a whole and Indian income as a whole, and no question arose as to whether Indian income tax has been paid on different parts of the Indian income.

It seems clear to us that when under Dominion income tax law different parts of the Dominion income are separately treated as regards the liability to Dominion income tax, we are bound to discriminate between those different parts and see whether Dominion income tax has been paid in respect of each of those parts or not.

In this case the income applied in payment of the debenture interest for which allowance has been made has been specifically excluded from the profits on which the appellant company has been assessed to New Zealand income tax, and consequently no New Zealand income tax has been in fact paid in respect of the profits so applied under the assessments made on the appellant company in respect of its business profits.

On the other hand, the appellant company has been separately assessed as agent for its debenture-holders in respect of the debenture interest paid by it, and has paid the tax so charged at the rates appropriate to the respective debenture-holders' incomes. The appellant company has not been able to reimburse itself by deduction of this tax from its debenture-holders. In view of the specific separation of the income applied in payment of the debenture interest for which allowance has been made from the rest of the income, we are of opinion that the income so applied must be regarded as a separate part of the appellant company's income.

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(1) (1925) 10 Tax Cas. 59.

We hold therefore that the appellant company is entitled to relief in respect of the New Zealand income tax on the profits of its business less the profits applied in payment of debenture interest for which allowance has been made, but it is also entitled to relief in respect of the income tax which it has paid on the debenture interest at the rates appropriate to the respective incomes of the debenture-holders, such interest being treated as its income under the decision in *Inland Revenue Commissioners* v. *Dalgety & Co.* (1)

There are three subsidiary questions to be dealt with :—

(*a*) The income from New Zealand War Loan is specifically exempted from New Zealand income tax under s. 78 (*h*) of the Land and Income Tax Act, 1923. This is clearly a separate part of the appellant company's income, and as no New Zealand income tax has been paid in respect of it the appellant company is not entitled to any relief.

(*b*) Five per cent. of the capital value of the land used by the appellant company for the purposes of its business or deriving profits therefrom has been allowed as a deduction by way of special exemption in computing the assessable income of the appellant company for the purposes of the New Zealand income tax. A part of the profits equal to 5 per cent. of the capital of the land has thus been excluded from the profits in respect of which New Zealand income tax has been charged and no New Zealand income tax has been paid in respect of this part of its profits. We hold, therefore, that no relief is due in respect of this part of its profits.

(*c*) As regards the dividends on the preference shares which the appellant company holds in X, although New Zealand tax has been paid by X on its profits, out of which those dividends have been paid, no New Zealand income tax has been paid or suffered by the appellant company on those dividends.

The parties having been unable to come to an agreement as to the method of computation of the relief to be allowed in respect of the New Zealand income tax which the company had paid on the debenture income, the Commissioners held a further meeting on November 8, 1932, to determine this point.

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(1) [1930] 1 K. B. 1; [1930] A. C. 527; 15 Tax Cas. 216.

Two questions emerged :—

(1.) As stated earlier in the case the company had paid New Zealand income tax on the debenture interest at varying rates appropriate to the incomes of the respective debenture-holders. Further, certain interest paid to the trustees of the Superannuation and Provident Fund had been altogether exempted from New Zealand income tax under s. 78 (i) of the Land and Income Tax Act, 1923. It was claimed on behalf of the company that the whole of the debenture interest on which the New Zealand income tax had been paid formed one part of the company's income, and that relief should be allowed at the rate arrived at by dividing the total amount of the income tax paid by the total amount of such debenture interest. It was claimed on behalf of the Crown that each item of debenture interest should be taken separately, and that relief should be allowed on each item at the rate of income tax paid on it, subject to the restriction imposed by s. 27, sub-s. 1 (*b*), of the Finance Act, 1920, to one half of the appropriate rate of United Kingdom income tax.

(2.) In the year 1927/1928 the company had not made enough profit in New Zealand to pay its debenture interest. Accordingly the debenture interest was paid to the extent of 10,556*l.* out of dividends on United Kingdom investments of the company which were not subjected to New Zealand income tax as income of the company, but New Zealand income tax had been paid by the company on the whole of the debenture interest, whether such interest was paid out of New Zealand profits or the United Kingdom dividends. It was claimed on behalf of the company that the sum of 10,556*l.* had borne income tax both in the United Kingdom and in New Zealand, and relief must be allowed thereon ; and on behalf of the Crown that the sum of 10,556*l.* was not taxed in New Zealand as income, but was only taxed by reason of its application in payment of debenture interest, and no relief was due thereon.

The Commissioners held that the debenture interest as a whole formed one part of the company's income, and the rate of relief to be allowed in respect of the tax paid on the debenture interest was to be computed by dividing the total tax paid in respect of the interest by the total amount of the debenture interest, including that part which had been exempted from New Zealand income tax. They further held that the United Kingdom income which had been applied in payment of the debenture interest had suffered both United Kingdom income tax and New Zealand income tax, and that relief should be allowed thereon accordingly.

The company appealed, and there was a cross-appeal by the Crown in regard to tax on debenture interest.

Finlay J. said it was conceded that if *Assam Railway & Trading Co.* v. *Inland Revenue Commissioners* (1), as decided by the Commissioners and affirmed by him, stood, the present case was correctly decided by the Commissioners in regard to the company's appeal. But Mr. Latter contended that it had been decided on a different ground in the Court of Appeal and the House of Lords—namely, that if income from one source was taxed in the United Kingdom and in the Dominion, an allowance must be made against double taxation on the lesser sum. It was said that differences as to what parts of the income were brought into assessment and differences as to the methods of computation must be ignored.

The main question there was what was the real effect of the decision in the *Assam* case (1), particularly in the House of Lords. He thought that the speeches in the House of Lords, and in particular that of Lord Wright, affirmed the views of the Commissioners and accordingly that it was not open to the company to contend that all that was necessary was to look at the two amounts at which the income was assessed in the two countries and to give relief in respect of the smaller amount. The company's appeal must be dismissed.

As to the cross-appeal in regard to the tax on the debenture interest the point was whether the income in respect of which the company paid tax in New Zealand as agent for the debenture holders could be regarded as its income within the meaning of the words in s. 27: "part of his income." He thought that could not be so, although he recognized that the company had not been able to recoup itself on the special facts of the case. The fact remained that the company paid the tax only as agent and at rates appropriate not to itself but to its various principals. It could not be said to be paying tax on its own income. The result was that the Crown's cross-appeal succeeded.

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(1) [1933] 2 K. B. 576; [1935] A. C. 445.

The company appealed against both decisions. The appeals were heard on January 25, 26, 27, 28 and February 11, 1937.

Latter K.C. and *Cyril King* for the appellant company. The point on which the Commissioners decided against the company applies only to the year 1928–1929. The figures for that year are important. The assessable income charged to tax in the United Kingdom was 70,017*l.* That figure included, however, amounts other than the profits of the business in New Zealand and these must be deducted, leaving an amount of about 45,000*l.* The company first claims that relief from double taxation should be given up to the amount of 45,000*l.* in so far as it is also the subject of taxation in New Zealand. The assessable income in New Zealand in respect of the profits of the business is 26,592*l.*, and to that extent therefore there has been double taxation. The Crown, however, claim to investigate these figures and to deduct from the English amount sums which under the New Zealand law are exempted from tax although part of the profits of the business. The question really turns on the construction of s. 27, sub-s. 1, of the Finance Act, 1920 (1), and in particular on the meaning of the words "the same part of his income." The meaning of these words has had to be considered in three cases. The first is *Rolls Royce, Ld.* v. *Short* (2), where the company failed to obtain relief because no Indian profits were included in the United Kingdom assessment. The other cases are *Inland Revenue Commissioners* v. *Dalgety & Co., Ld.* (3), and *Assam*

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(1) See p. 708 post.

(2) 10 Tax Cas. 59.

(3) [1930] 1 K. B. 1; [1930] A. C. 527; 15 Tax Cas. 216.

Railways & Trading Co. v. *Inland Revenue Commissioners.* (1) The last of these cases as decided in the Court of Appeal and the House of Lords supports the contention that when once the assessable income in respect of one source has been ascertained in the two countries, no investigation can be made of the differences of method of arriving at the figures in the two countries, but relief must be given to the extent that the two amounts of assessable income show that there has been double taxation. If the Colonial assessable income is less than the United Kingdom assessable income it is that part of the income that has suffered double tax. "Income" in s. 27, sub-s. 1, does not mean actual income but notional income for the purpose of taxation. There remains the question in regard to debenture interest. While it is true that the income of the company applied in New Zealand in paying that interest is excluded from the income of the company in arriving at the figure of 26,592*l.*, the company pays the tax on the interest as agent for the debenture-holders. The company has therefore paid tax in respect of debenture interest in both the United Kingdom and New Zealand, and to the extent that this is so the company is entitled to relief under s. 27 of the Act of 1920: *Inland Revenue Commissioners* v. *Dalgety & Co., Ld.* (2) That case shows that provided the tax is paid by the company it makes no difference how it is ultimately borne. In fact, however, the company has no right to recoupment in respect of the tax paid in New Zealand because although under s. 130 of the Land and Income Tax Act, 1923, a right of recoupment is conferred on it the company cannot avail itself of the right because the interest on the debentures is payable free of the tax under a contract in the United Kingdom. The *Dalgety* case (2) really covers this point and shows that income used in paying debenture interest is part of the income of the company.

[They also referred to *Stevens* v. *Bowstead & Co.* (3); *Earl Howe* v. *Inland Revenue Commissioners* (4); *Birmingham*

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(1) [1935] A. C. 445.
(2) [1930] A. C. 527.
(3) [1918] 1 K. B. 382.
(4) [1919] 2 K. B. 336, 343.

Corporation v. *Inland Revenue Commissioners* (1), and *London & South American Investment Trust* v. *British Tobacco (Australia), Ld.* (2)]

Sir Terence O'Connor S.-G. and *Reginald Hills* for the Crown. It is contended that this case is entirely covered by *Assam Railways & Trading Co.* v. *Inland Revenue Commissioners.* (3) There is nothing inconsistent with that case in decisions of the Special Commissioners and of Finlay J. in the present case. For the appellant company it is contended that relief from double taxation should be given in respect of 26,592*l.* and in respect of the debenture interest. In support of the first contention it is said that the *Assam* case (3) dealt only with figures representing the assessable income at home and in the Dominions in respect of a particular source and that these figures could not be analysed in order to ascertain how far in truth there had been double taxation. That is wrong in principle and on the authority of the *Assam* case. (3) The Crown's contention is that the ingredients of which the assessable income is made up must be looked into and this follows by implication from the speeches in the House of Lords of Lord Wright and others in the *Assam* case. (3)

The burden of proof is on the appellant company under the Finance Act, 1920, s. 27, sub-s. 1, to show that it has paid United Kingdom tax on a part of its income and Dominion tax on the same part of its income. In the subsection the income referred to is notional income and it is therefore necessary to find the same notional income, taxed in both countries. For this it is necessary to analyse the assessable income and it is then discovered that there are three ingredients which are subjected to tax in the United Kingdom that are exempted in New Zealand. These are (1.) debenture interest, (2.) 5 per cent. of land value, and (3.) the preference dividend on shares. These items are sufficient to account for the whole of the assessable income in the United Kingdom and there has therefore been no double taxation; for in looking for the amount on which relief from United Kingdom tax is to be given all items must be excluded which are shown not to have borne Dominion tax. This view receives support from *Rolls Royce Co.* v. *Short.* (1)

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(1) (1930) 15 Tax Cas. 172.
(2) [1927] 1 Ch. 107.
(3) [1935] A. C. 445.

[Lord Wright M.R. The sum of 70,014*l.* is a notional computation of the income in the United Kingdom just as the sum of 26,592*l.* is in New Zealand.]

Yes, but the taxation in the two countries is not on the same part of the income in view of the sums excepted for taxation in New Zealand. It is argued on behalf of the appellant company that when once the assessable income in respect of the same source has been ascertained, the ingredients cannot be analysed; but the very first thing Mr. Latter admitted was that from the sum of 70,014*l.* must be deducted amounts included therein which did not relate to the profits of the trade in New Zealand. It is difficult to see any good principle on which the disintegration of the assessable income can proceed so far but no further: *Inland Revenue Commissioners* v. *Dalgety & Co.* (2) had been cited in support of the appellant company on this point, but in that case it was not suggested that the same amount had not been taxed in the United Kingdom and in the Dominions.

The position as regards debenture interest paid in New Zealand must be considered in the light of New Zealand law, and under that law the company after paying the debenture interest as agent for the debenture-holders has a right to recoupment by them. It makes no difference that under the English law and the contract made in England no recoupment can be obtained. Further as regards the sum paid for debenture interest the company is not being assessed in respect of its own income but in respect of the incomes of the debenture holders. Sect. 27, sub-s. 1, of the Act therefore has no application. It is not a payment on "part of his income" within the meaning of that sub-section. The *Dalgety* case (2) is distinguishable in that the New Zealand tax here was paid in respect of other persons' incomes. The

(1) 10 Tax Cas. 59.
(2) [1930] 1 K. B. 1; [1930] A. C. 527.

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part of the company's income so applicable is taken out of the company's income for taxation purposes and tax is only paid as agent for the debenture holders. The Special Commissioners were influenced by the fact that there was here no right of recoupment, but that does not convert the payment by the company as agent into a payment by it as principal.

Latter K.C. replied.

1937. Feb. 11. LORD WRIGHT M.R. (whose judgment was read by ROMER L.J.): I have read the judgments prepared and about to be delivered by my brethren Romer L.J. and Greene L.J. I am so fully in agreement with these judgments in every respect, both as regards reasoning and conclusions, that it is a work of supererogation to add any observations of my own. But I may perhaps say that as I read the sub-section, the protean and ambiguous word "income" as there used means the figure of income or part of income as assessed for tax purposes in either jurisdiction. The income or part of income, that is the figure so assessed, is that on which the person has paid or become liable to pay tax within the words of the section, in the United Kingdom and in the Dominion respectively. Once it is established on the principles expounded by my brethren that the same part of income is assessed in the Dominion as that assessed in the United Kingdom, "double taxation" is pro tanto established, on the basis of and to the extent of the smaller assessment; the figures of assessment respectively are the material figures of income for this purpose.

ROMER L.J.: On this appeal the Court is once more invited to consider and apply the provisions of s. 27, sub-s. 1, of the Finance Act, 1920. As the section has been recently discussed and explained by the House of Lords in the case of *The Assam Railways & Trading Co.* v. *Commissioners of Inland Revenue*, (1) it becomes necessary to examine the facts and the judgments given in that case in some detail.

The facts, so far as material for the present purpose, were

(1) [1935] A. C. 445.

as follows : The company concerned was an English company carrying on a business in India, from which business the whole of its income was (with a small exception) derived. It was controlled by its Board in England and was accordingly taxed under Case I. of Sch. D of the Income Tax Act, 1918, on the whole of the profits arising from its business in India. Under the rules applicable to that case the tax on its income for the year ending April 5, 1929, fell to be computed on the company's profits for its financial year ending on March 31, 1928. The profits so computed amounted to the sum of 186,750*l*. Under the Indian Income-tax Act the tax for the year 1928–1929 had to be computed on the profits for the same financial year, but those profits when ascertained in accordance with that law amounted only to 129,365*l*. This was due to the following facts : (1.) According to the Indian Act the sum paid by the company as interest on its debentures and amounting to 42,500*l*. was a permissible deduction, whereas it was not so in the United Kingdom. (2.) The profits derived by the company from a certain tea garden amounting to 8343*l*. were excluded from the Indian computation but were included in that of the United Kingdom. (3.) Other divergencies between the two systems of taxation resulted in a net excess of 6542*l*. in the profits as ascertained in the United Kingdom over the profits as ascertained in India.

The company in due course paid United Kingdom income tax calculated at the appropriate rate on 186,750*l*. and paid Indian income tax at the appropriate rate on 129,365*l*. In these circumstances it was plain that the company was entitled to relief under s. 27, sub-s. 1. The question to be determined was as to the basis upon which such relief was to be calculated. The contention of the company was this : "The subject of taxation both in India and in the United Kingdom is the income derived from the business carried on in India during the year of assessment ending on April 5, 1929. According to the law of each country the tax on that income is ascertained by taking a notional sum that bears no relation to the actual income in fact and applying the appropriate rate to that notional sum. The fact that the notional sums are different in the two countries is immaterial. The notional sums are only brought into notional existence for the purpose of ascertaining what income tax should be charged in the respective countries on the profits of the business earned in the year of assessment. Having served that purpose they need not be considered further. We have paid income tax for the year of assessment both in the United Kingdom and in India on precisely the same income and are entitled to relief under the section upon that footing." It is an attractive argument and none the less so because it involves the proposition that throughout the sub-section the word "income" means "income" and nothing else. Had it been accepted, the company would have been entitled to be relieved to the extent of but not exceeding half the United Kingdom rate on the sum of 186,750*l.* For the purpose of ascertaining the rate the actual income from the Indian business would no doubt have to be ascertained. But this should present no difficulties to a competent accountant. If any such difficulty should occur it would have to be settled by the appropriate tribunal. The actual profit having been ascertained, the Indian rate and the United Kingdom rate for the purposes of the section would be ascertained by dividing the amount paid in tax in the two countries respectively by the amount of the actual profit.

This contention on the part of the company failed, however, to find acceptance at the hands of the Commissioners for the Special Purposes of the Income Tax Acts, Finlay J., the Court of Appeal or the House of Lords; and must now be regarded as unsound.

The Special Commissioners held that the company was entitled to relief in respect of the sum of 135,907*l.* This sum was arrived at by deducting from the sum of 186,750*l.* the two sums of 42,500*l.* and 8343*l.* They treated the sum of 186,750*l.* as being the taxable income in the United Kingdom, and 129,365*l.* as being the taxable income in India. They then analysed these two sums and found that inasmuch as no debenture interest had been deducted in the United Kingdom computation and had been deducted in the Indian computation, 42,500*l.*, part of the United Kingdom taxed income, had not been taxed in India. They further found that 8343*l.* had been included in the United Kingdom taxed income but had not been taxed in India. The reason why they did not also find that 6542*l.*, further part of the 186,750*l.*, had not been taxed in India would seem to have been that they had not been asked to do so by the Inspector of Taxes. Attention was called to this omission in para. 7 of the respondent's case when the matter eventually came before the House of Lords. On an appeal by the company to Finlay J., that learned judge affirmed the decision of the Commissioners and, as I read his judgment, upon the same grounds as those on which the Commissioners had proceeded.

Pausing there, it is to be observed that the question whether and to what extent income tax in this country or in India would ultimately fall on the debenture holders in respect of the interest paid to them was immaterial. Income tax on the 42,500*l.* had been paid by the company here and had not been paid by the company in India, and that is all that mattered. For it had been decided by the House of Lords in the *Dalgety* case (1) that the word "paid" in the section means "paid" and not "ultimately paid."

The decision of Finlay J. was affirmed by the Court of Appeal, but on somewhat different grounds. They agreed with the learned judge in treating the sum of 186,750*l.* as the income from the Indian business that had been taxed in the United Kingdom and not merely as a notional sum arrived at for the purpose of calculating the tax to be paid on the real income for the year of assessment. They also treated the 129,365*l.* as representing the part of the 186,750*l.* that had been taxed in India and as representing, therefore, the only part of the company's income from the Indian business that had borne tax in both countries. They made no analysis of the two figures. They rejected, indeed, the idea that any such analysis ought to be made. "When we come to consider," said the Master of the Rolls, "what is to be the relief, it has to be shewn by the taxpayer that on a part of the income which is his statutory income in the United Kingdom he has paid Dominion income tax for that year. Now are we to reopen and to readjust the figures in each country? Are we to set side by side the items which compose the total assessable income for which the man is to be charged first in the Dominion and afterwards in the United Kingdom? To my mind, not so. You have to deal with the results which have been attained by following the legislative directions in each country, and you have to deal with the total result when those exemptions or deductions or abatements have been allowed, and you cannot scrutinize those abatements or deductions by a comparison with a different system in the other part of the Commonwealth; and it falls upon the taxpayer to prove that he has paid income tax for that year in respect of the same part of his income." The Appeal Court accordingly held that the company was entitled to relief in respect only of 129,365*l.* But as the Crown was content with the figure of 135,907*l.* arrived at by the Commissioners the appeal was merely dismissed.

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(1) [1930] A. C. 527.

The matter was then taken to the House of Lords (1), who unanimously affirmed the decision of the Court of Appeal. Lord Warrington of Clyffe, in his speech, summed up the conclusions as follows (2): "In the present case the part of his income on which the taxpayer has paid tax in England is 186,750*l.* In India he has paid tax on a smaller part numerically of the same income." This was precisely the view of the case that had commended itself to the Court of Appeal. Lord Wright also agreed (3) with that view. "The Court of Appeal," he said, "in confirming (in substance) the ruling of the Special Commissioners, took the view (rightly as I think) that the true amount on which relief should be given was 129,365*l.*" I would call attention to the words "in substance." Later on he said (4): "On the words of the section it seems that the appellants can only show double taxation in regard to 129,365*l.* which is a part of the 186,750*l.*" Lord Blanesburgh, Lord Atkin and Lord Thankerton agreed with the judgments of Lord Warrington of Clyffe and Lord Wright.

(1) [1935] A. C. 445.
(2) Ibid. 454.
(3) Ibid. 456.
(4) Ibid. 460.

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The case seems to establish the following conclusions: (1.) That the word "income" in the section does not mean the real income but the "statutory" or "notional income" by means of which the tax is calculated. (2.) That if this statutory income in the Dominion is £A and in the United Kingdom the statutory income from the same source is £(A + B) relief will be given in respect of £A. (3.) That an analysis of the two statutory incomes for the purpose of comparing for example the respective allowances for repairs or depreciation is inadmissible. It is in regard to the two latter conclusions that the view taken by the Special Commissioners and Finlay J. differed from that taken by the higher tribunals. The difference is one of vital importance. If the two statutory incomes are to be dissected, as was done by the Special Commissioners, every item appearing on the debit side in the Dominion account that does not appear on the debit side of the United Kingdom account must be regarded as having borne income tax in the United Kingdom and not in the Dominion and vice versa. If, for instance, in the Dominion 1000*l.* be allowed for depreciation and nothing for bad debts, and in the United Kingdom 1000*l.* be allowed for bad debts and nothing for depreciation, then although the statutory incomes in the two countries might be equal (say 10,000*l.*) relief could only be given in respect of 9000*l.* The same result would occur in case of a difference in relation to receipts of the business. The receipts of the business might in the Dominion be treated as being worth 50*l.* less than the value at which the same receipts are brought into account in the United Kingdom. The total statutory incomes might be the same and yet relief would only be given in respect of the statutory income less the 50*l.* In cases where the statutory incomes of the two countries are the incomes or average of incomes over different periods of time hopeless confusion would result. In the United Kingdom the statutory income is that of or for the year preceding the year of assessment. In the Dominion it might be that of the year of assessment. In such a case no relief could be granted at all even though the statutory income in the Dominion were equal to that in the United Kingdom. For no item on either side of the two accounts would be the same. The view taken by the Court of Appeal and the House of Lords in the *Assam* case (1) would, however, lead to no such difficulty. Nothing need be regarded except the two statutory incomes of the business, taking care, of course, to see that neither includes income from any other source. Relief will then be given to the extent of the smaller of the two sums without inquiry into the reasons for the difference between them. The statutory income is in such case to be treated as the taxable income for the year of assessment. Both sums must be treated as representing income derived from the same source and for the same period, namely, the year of assessment. It necessarily follows that the smaller sum is a part of the larger sum, as was pointed out both by Lord Warrington of Clyffe and Lord Wright in the *Assam* case. (1)

But just as it is necessary to see that the statutory incomes do not include any receipts from sources other than the business, so also is it necessary to see in each case that no profits of the business are being taxed otherwise than through the medium of the statutory income. For what has to be ascertained for the purpose of the section is how much tax has been paid by the company on its profits in this country and in the Dominions respectively.

It only remains to apply these considerations to the present case, taking for that purpose the year of assessment 1928/1929. The United Kingdom statutory income from the whole of the company's business for that year was 70,017*l.* This figure, however, included certain receipts from sources other than the business of the company in New Zealand amounting together to 25,549*l.*, leaving the statutory income for the last mentioned business 44,468*l.* The New Zealand statutory income was 26,592*l.* The appellants are therefore entitled to relief in respect of that sum. That will be the only relief to which they are entitled if under the New Zealand law the profits from the New Zealand business are only taxed by reference to the New Zealand statutory income. It

(1) [1935] A. C. 445.

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appears, however, that the effect of the Land and Income Tax Act, 1923, of New Zealand is to exclude from the statutory income a sum equal to the interest on debentures, the money secured whereby has been employed in the production of the assessable income, and to tax such sum in the hands of the company. The profits of the New Zealand business are not, therefore, taxed merely by reference to the statutory income; but partly by reference to that income and partly by reference to the amount of interest payable in respect of its debentures. The amount taxed under this latter head is the sum of 34,779*l.*, and on this sum the company is also entitled to relief. It is true that as regards such last mentioned part of the company's profits the company has only been assessed as agents for the debenture-holders; but this is immaterial. In order to get relief under the section it is sufficient for the company to show that it has paid the New Zealand tax on that part of its profits. The question in what capacity it has paid it and the question whether the tax falls ultimately on the company or the debenture-holders are beside the point. The company has paid United Kingdom income tax on a part of its income, namely 34,779*l.*, and has proved that it has paid Dominion tax in respect of the very same thing. In accordance with the plain words of s. 27, sub-s. 1, of the Finance Act, 1920, it is entitled to relief on that sum.

For these reasons I am of opinion that both appeals should be allowed.

GREENE L.J.: Sect. 27, sub-s. 1, of the Finance Act, 1920, provides as follows: " If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income " at a rate to be determined as therein mentioned. The language of this provision appears at first sight to be reasonably clear. The first thing to consider is whether the person claiming relief is liable to United Kingdom income tax "on any part of his income." His income for the purposes of United Kingdom income tax may comprise a number of elements derived from different sources and taxable under different Schedules. Any one of these elements may be a "part of his income" for the purposes of this limb of the sub-section. The next question for consideration is whether he has paid Dominion income tax for the year in question "in respect of the same part of his income." It is said that in strictness the word "same" is necessarily inappropriate to convey the meaning intended since income as assessed for United Kingdom income tax is a notional sum and the income on which Dominion income tax is paid cannot be the "same." This, to my mind, presents no practical difficulty in construing the sub-section, nor am I prepared to find in its language such abstruse metaphysical difficulties as were suggested in the arguments for the Crown. The sub-section says that identity exists, and as a practical matter I find no difficulty in treating the assessed income which is taxed in a Dominion as being the "same" as that taxed in the United Kingdom. Now even if the matter had been devoid of authority, I should have thought that the character of the identity postulated by the words "the same part of his income" was not difficult of ascertainment. If the income is derived from dividends on shares or interest on debentures, and it is taxed in both countries, the identity is apparent. If the income is derived from a business, the question is more complicated but not, in my opinion, any more difficult to answer. In such a case, in order to ensure the identity which the sub-section requires, the first thing to do is to see that the income taxed in the Dominion is the same as that taxed in the United Kingdom in the sense that each includes, and includes only, income (that is to say, incoming profits or gains) which is common to both, and any necessary adjustments of the accounts to ensure this result must be made. To take a simple example: if an English company carries on from England business both in England

and in a Dominion, its assessment here will be on the amount of the profits of the entire business. But in the Dominion it will be assessed only on the profits of the business so far as carried on in the Dominion. It is accordingly necessary, in order to achieve the primary identity of the two incomes, to dissect the United Kingdom assessment and eliminate from it that portion which represents the profits of the English business. This is a perfectly simple and intelligible operation, and presents no difficulty in principle. But it will be noticed that the only matters to be eliminated from the United Kingdom or the Dominion assessment (as the case may be) are incoming profits or gains which are not common to both assessments. It is, in my judgment, essential to the proper understanding of this case to appreciate the fundamental distinction between sums which truly represent incoming profits and gains and sums which represent allowances or permissible deductions in arriving at the assessable income. For reasons which will appear later, it is only the former which must be eliminated, not the latter. But the process of arriving at the identity of the two incomes does not stop at the point where incoming profits or gains not common to both assessments have been eliminated. When this has been done, the resultant figures for the United Kingdom income and the Dominion income will in all probability be different by reason of differences in the two methods of arriving at assessable income. It must have been present to the mind of the Legislature that uniformity in the method of assessing business profits is not to be found throughout the Empire. The rules for the deduction or non-deduction of expenses or the allowance for wear and tear (to take some examples) which operate in the United Kingdom, may differ widely from those in force in a Dominion. And here it is necessary to see that what I may call a secondary identity is attained. If after the elimination of incoming profits or gains which are not common to both assessments the income from the Dominion business is for the purpose of the United Kingdom assessment (let me say) 10,000*l.*, and for the purpose of the Dominion assessment 8000*l.*, it is only in respect of 8000*l.*

that the identity exists. 8000*l.* is not "the same part" of the company's income as 10,000*l.*, even though each figure represents an assessment in respect of the same incoming profits or gains. The relief given by the sub-section is therefore to be ascertained on the footing that the only part of the business income in respect of which tax is exigible in both countries is 8000*l.* In the converse case if the figures are reversed the only part of the company's income on which tax is exigible in the United Kingdom will be 8000*l.* and the additional 2000*l.* in the Dominion assessment will not entitle the company to any relief.

In support of the views expressed above, I may quote some words from the speech of the present Master of the Rolls in the *Assam* case. (1) His Lordship said: "It seems clear that there must be a definite part of income brought into question, and that can only be expressed in a sum of money. As income ex vi termini must be expressed in a sum of money, the words 'the same part of his income' must involve a comparison between two sums of money, which prove to be the same. The contention of the appellants is to the contrary; it is said on their behalf that the words 'the same part of his income' refer solely to what is called the source, and that identity of amount is immaterial and does not come into question except for the purpose of ascertaining the rate of tax to be allowed for. I cannot agree with this argument. No doubt, questions of source, as it has been called, that is, such questions as where the income comes from, are essential to identify, so far as that aspect goes, what is taxed in the United Kingdom with what is taxed in the Dominion; but in addition the income itself, that is, the amount of money, must also be identified. I think the words 'the same part of his income' are apt to include both elements of comparison and identification." Lord Blanesburgh expresses the same view in a different way. (2)

In order to apply these principles to the present case, it is necessary to examine shortly the facts relating to the two assessments. There are some variations in the figures in the

(1) [1935] A. C. 445, 459. (2) Ibid. 452.

various documents due to certain adjustments which have been made, but I will take the round sums which will readily be recognizable. The figure of the United Kingdom assessment for the year 1928/1929 is 70,000*l.* This includes, in addition to the profits of the business in New Zealand, the following items of incoming profits or gains: (1.) United Kingdom profits; (2.) New Zealand War Loan interest; (3.) New Zealand preference dividend; (4.) ordinary dividends on shares in "X", amounting in round figures to 25,000*l.*

Now none of these items is brought into the New Zealand assessment, and the first step necessary to secure identity between the two incomes is to deduct them from the United Kingdom assessment which will then give the figure of 45,000*l.* as representing that part of the United Kingdom assessment which is exclusively referable to the part of the income which is taxed in both countries. This is what the Master of the Rolls in the *Assam* case (1) describes as "identification of what is taxed in the United Kingdom with what is taxed in the Dominion." Now the New Zealand assessment in respect of that part of the income is 26,000*l.* only, and it is in respect of this figure that what the Master of the Rolls describes as "identification of the income itself, that is, the amount of money" exists. The result, in my opinion, is that the appellants are entitled to relief upon the basis that to the extent of the assessment of 26,000*l.* they have paid Dominion tax upon the profits of the New Zealand business which are the same subject-matter of taxation as those covered by the United Kingdom assessment as adjusted in the way which I have described. This result appears to me to accord with the language of the sub-section, the construction placed upon it by the House of Lords in the *Assam* case, (1) and with good sense.

Upon the view of the meaning of the sub-section which I have expressed, differences between the rules prevailing in the two countries as to such matters as allowances and deductions of expenses are entirely disregarded. To take a simple example: let me assume that the method of arriving

(1) [1935] A. C. 445.

at the assessable profits of a Dominion business is identical both in principle and in the matter of amount in both countries with the exception of wear and tear allowance, and gives for each country a figure of 10,000*l.* before deducting that allowance. Let me assume then that the allowance in the United Kingdom is 750*l.* (giving a United Kingdom assessment of 9250*l.*) and in the Dominion 1000*l.* (giving a Dominion assessment of 9000*l.*). The business income on which Dominion tax has been paid will be 9000*l.*, that on which United Kingdom tax has been paid will be 9250*l.* and relief will be given accordingly. It is quite illegitimate, in my opinion, to treat the difference between the two allowances, namely, 250*l.*, as in some sense a part of the business income which has not suffered tax in the Dominion and has therefore, for the purposes of the sub-section, to be deducted from the United Kingdom assessment under the guise of eliminating from that assessment a piece of income which has not borne tax in the Dominion. In truth, what has borne tax in the Dominion in such a case is the business profits as assessed, not merely a part of those profits ascertained after deducting the excess of the Dominion allowance over the United Kingdom allowance. Nor is the position, in my opinion, any different if one of the countries makes an allowance or permits a deduction of a kind not recognized in the other country. Again, let me take a simple example. I will assume that all figures are identical in the two countries except that in the United Kingdom an allowance is given which is not given in the Dominion—for example, an allowance of £500 in respect of bad debts—giving an assessment of 9500*l.* and a deduction is permitted in the Dominion which is not permitted in the United Kingdom—for example, a deduction of 500*l.* in respect of certain expenses of the business—giving an assessment of 9500*l.* The two figures which are comparable for the purposes of relief under the sub-section will be 9500*l.* and 9500*l.*—not 9000*l.* and 9000*l.* as they would have to be if the £500 in each case were to be treated as an untaxed part of the business profits.

It is at this point that what, in my opinion, is the fallacy underlying the Crown's argument on this part of the case emerges. It is due to a failure to distinguish between two things fundamentally different, namely, an incoming profit and an allowance or deduction. I have already referred to the items of incoming profit which are included in the United Kingdom assessment but not in the New Zealand assessment and shown how these must be deducted from the United Kingdom assessment for the reason that that assessment is pro tanto referable to these items. But the Crown seeks to treat on the same basis as these items certain sums representing allowances or deductions made in New Zealand—namely, (1.) Debenture interest; (2.) 5 per cent. unimproved value of land allowance, amounting in round figures to 45,000*l.* These sums it is said must be deducted from the United Kingdom assessment on the basis that they are pieces of income, not taxed in New Zealand, to which pro tanto the United Kingdom assessment is referable. The result is to reduce the United Kingdom assessment to nothing or a minus quantity for the purpose of the sub-section and to destroy the claim to relief. But it is to be noticed that the effect of these allowances and deductions is in itself to reduce the amount of the New Zealand assessment and so to reduce the area of double taxation in respect of which relief may be claimed. To use them again for the purpose of still further reducing that area is in my opinion wholly illegitimate.

The Crown's argument here is in my judgment based on a misconception of the effect of the *Assam* decision. (1) I have had the advantage of reading the analysis of that decision contained in the judgment which Lord Justice Romer has just read and I entirely agree with it. I only wish to add one observation of my own. In the *Assam* case (1) the appellants were endeavouring to write back into the Indian assessment two sums which had not entered into that assessment at all, one of which was an item of incoming profit not taxed in India, namely, the Bogapani Tea Garden account and the other of which was a deduction in respect of debenture

(1) [1935] A. C. 445.

interest. For the purpose of the decision in that case the difference in character of these two items was irrelevant; it was equally inadmissible to add back the one and the other in order to *write up the Indian assessment above its true figure.* But this is an entirely different thing to saying that the fact that a particular deduction is allowed in a Dominion which is not allowed in the United Kingdom can be used in order to *write down the United Kingdom assessment below its true figure*, which is what the Crown claims to be able to do in this case.

I have so far dealt only with the New Zealand assessment in respect of business profits and for that purpose I have treated the deduction of a sum equal to the debenture interest as what for the purpose of that assessment it in fact is, namely, a true deduction of a business expense. But the company was assessable and was in fact assessed in respect of what it paid for this interest under a different provision of the New Zealand statute, namely s. 116. Under that section a company is to be the agent of the debenture-holders for the purposes of the Act and is assessable in respect of interest paid to them accordingly. The appellants contend that as no deduction was permissible in respect of the debenture interest for the purposes of the United Kingdom assessment they have paid United Kingdom income tax upon it; that they have also paid New Zealand income tax upon it; that the fact that under the New Zealand Act this tax is chargeable under a different section is irrelevant since all that s. 27, sub-s. 1, of the Finance Act, 1920, requires is that Dominion tax shall have been paid; and that the fact that under the New Zealand statute they are to be deemed to have paid as agents and have in New Zealand a statutory right of recovery against the debenture-holders—a right which is not enforceable in this country—is also irrelevant. In my opinion the argument of the appellants upon this point is right. Whether or not the part of the Company's income in respect of which it has paid tax in the Dominion is the same as the part of its income on which it is chargeable to United Kingdom income tax is in my judgment to be decided by reference to English law alone; and the fact that for purposes of its own the New Zealand Legislature has chosen to treat the sum paid away in interest as in a different tax category to that in which it is treated here cannot in my opinion affect the matter. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Freshfields, Leese & Munns; Solicitor of Inland Revenue.*

H. C. G.

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[1936. M. 863.]

Practice—Payment into Court—Trial before judge alone—Oral judgment—Communication to judge of fact of payment in before judgment entered—Alteration by judge of his judgment—Order drawn up for different amount than that stated in oral judgment—Competency of judge to alter judgment—R. S. C. Order XXII., *r.* 6.

By Order XXII., r. 6, of the Rules of the Supreme Court: ". . . . no communication of that fact [that money has been paid into Court] shall at the trial of any action be made to the judge or jury, until all questions of liability and amount of debt or damages have been decided . . . ."

A judge, at the trial of an action in the High Court without a jury for personal injuries, by his oral judgment gave judgment for the plaintiff for 50*l.* damages with costs. He was then informed that there had been a payment of 20*l.* into Court. He then gave the plaintiff such costs as would be awarded if the action had been brought in the county court. On the following day an application was made to the judge with regard to the costs. The judge then said that he thought that 50*l.* damages was excessive and ordered that the plaintiff recover from the defendant 35*l.* damages with costs to be taxed on the county court scale. At that time the judgment had not been drawn up. On an appeal by the plaintiff:—

Held, that Order XXII., r. 6, was directory and not compulsory, and that if the fact that there had been a payment into Court was disclosed to the judge before he delivered his judgment the rule did not compel the judge to refuse to continue to hear the case, but he had a discretion, if he were of opinion that the statement as to payment in could not reasonably be calculated to cause any miscarriage of justice, to allow the case to proceed, and if he did so that did not afford any ground upon which the Court of Appeal could order a new trial; and further that the rule did not interfere with the power of a judge to alter his judgment at any time before the judgment had been drawn up and perfected.

APPEAL from a decision of Hilbery J.

The plaintiff brought an action against the defendants alleging that she had suffered injury through the negligence of a servant of the defendant company in upsetting a jug of hot water upon her whereby she suffered a severe scalding of the left arm and shock, and she claimed damages. The action was tried before Hilbery J. under the New Procedure Rules on May 13, 1936, without a jury, and he, having heard the evidence, found that the plaintiff had been injured through the negligence of the defendants' servant, and by his oral judgment awarded the plaintiff 50*l*. damages. The defendants' counsel then asked that costs should be awarded on the county court scale, but Hilbery J. pointed out that the sum awarded of necessity carried costs on the High Court scale; he, however, expressed the view that the action should have been brought in the county court and intimated that he would have liked to have limited the costs to county court costs. After the judge had stated his intention to award 50*l*. damages and costs the defendants' counsel informed the judge that the defendants had paid 20*l*. into Court. This sum was on the application of the plaintiff's counsel ordered to be paid out to the plaintiff, and judgment for 50*l*. with costs was ordered. The learned judge, however, refused to certify for High Court costs, but ordered such costs as would have been ordered if the case had been brought in the county court. He added: "I think I have stretched this matter in arriving at the sum of 50*l*." On the following day, May 14, a further application was made to the learned judge, and he then said that he had given the case further serious consideration, and had come to the conclusion that the 50*l*. damages was excessive, and by formal judgment dated and entered that day, May 14, 1936, he ordered that the plaintiff recover from the defendants 35*l*. with costs to be taxed on the county court scale.

The plaintiff appealed.

Pritt K.C. and *Samuel Lincoln* for the appellant. The decision of Hilbery J. was wrong. At the trial on May 13, the learned judge gave judgment for the plaintiff for 50*l*. with such costs as would be awarded if the action had been brought in the county court. Under that order judgment would have been drawn up for 50*l*. damages with county court costs. That judgment would have been wrong: *Jenkins & Co.*

v. *Simon.* (1) On the following day, plaintiff's counsel applied to the judge to hear further argument with regard to costs, and the judge said if he could reopen the case with regard to costs, he could also reopen it with regard to the amount of damages. He thought he had awarded too much damages and that the proper figure should be 35*l.* If the judge had done that before Order XXII., r. 6. (2), as to payment in, had been amended, no objection could have been taken: see *In re Suffield & Watts; Ex parte Brown* (3), where Fry L.J. said: "So long as the order has not been perfected the judge has a power of reconsidering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end." But now under that rule the judge is protected from any knowledge of any payment into Court. A judge should not be told that there has been a payment into Court if he is going to alter his judgment as to the amount of damages awarded. If a judge is told that there has been a payment into Court he ought not to proceed with the trial of the action. The effect of the amendment to the rule is that in dealing with costs the judge must take into account the fact that there has been a payment into Court, but in that event the judge must previously have assessed the damages finally, so that he would not alter them afterwards, otherwise the judge could not deal with costs until the judgment has been drawn up. The effect of the rule as amended is to disqualify the judge from acting upon his right to alter his judgment before it has been drawn up.

[SLESSER L.J. If that is the true effect of the amendment to the rule it is probably ultra vires.]

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(1) [1926] 1 K. B. 111, 118.

(2) R. S. C. Order XXII., r. 6: "Except in an action to which a defence of tender before action is pleaded or in which a plea under the Libel Acts, 1843 and 1845, has been filed, no statement of the fact that money has been paid into Court under the preceding rules of this Order shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided, but the judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into Court and the amount of such payment."

(3) (1888) 20 Q. B. D. 693, 697.

If a judge permits a statement as to payment in to be made to him before the judgment is perfected by being drawn up that is a ground for setting aside the judgment and ordering a new trial.

The old rule Order XXII., r. 22, prohibited disclosure of the fact that money has been paid into Court to the jury in any case tried by a judge with a jury and there is a note in the Annual Practice for 1933, p. 422, to the effect that if disclosure of the fact that money has been paid into Court, or of the amount paid in is made to the jury, the judge will stop the case and discharge the jury, and give such directions as to the rehearing as he may think fit: see *Jaques* v. *South Essex Waterworks Co.* (1) The same considerations apply when the amended rule says that knowledge of the fact of payment in shall not be disclosed to a judge. It was held by the Court of Appeal in *Williams* v. *Goose* (2) that the old rule Order XXII., r. 22, was one relating to procedure and was not ultra vires.

The communication to the judge, in contravention of Order XXII., r. 6, of the fact that money had been paid into Court before the judgment was drawn up and perfected, has produced such danger of miscarriage of justice by its very nature as to make a new trial necessary. As the judge was informed after he had given his oral decision, but before the judgment had been drawn up and perfected, of the fact that there had been a payment into Court and of the amount of such payment, the judge was not competent thereafter to enter judgment for a sum different from that which he had stated orally to be due to the plaintiff before any mention of the payment into Court had been made to him.

Fearnley-Whittingstall for the respondents. The decision of the judge was correct. He reduced the amount of damages because he thought he had given too much in the first instance; he was not affected by the fact that he knew that there had been a payment into Court. Order XXII., r. 6, can only disqualify a judge from altering his judgment if a miscarriage of justice is thereby produced. A jury cannot recall their verdict, but a judge can review his own decision. A judge is not disqualified

(1) (1904) 20 Times L. R. 563.

(2) [1897] 1 Q. B. 471.

by the rule from altering his judgment until it is drawn up. It may be that if the Court of Appeal is of opinion that the judge was affected by the knowledge of the payment in, that would be a ground for granting a new trial. There is no authority for saying that if a jury—and a fortiori a judge—is informed of the fact that there has been a payment into Court that that is a ground for granting a new trial. The rule is merely a rule of practice and if the rule is infringed it does not disqualify the judge or render it obligatory upon him or the Court of Appeal to order a new trial.

[SCOTT L.J. Why should not the amended rule, which merely adds "judge" to the jury in the old rule, be construed in the same way as the old rule?]

A judge cannot be placed in the same position as a jury. Unless there is some authority to the effect that the old rule was obligatory and that if a jury is informed that there has been a payment into Court it must be discharged and an order made for a new trial, the rule is discretionary and therefore it is discretionary in the present case. In *Klamborowski* v. *Cooke* (1) Lord Russell of Killowen refused to follow the rule and himself told the jury the amount that had been paid into Court. *Jaques* v. *South Essex Waterworks Co.* (2) is not an authority for the proposition for which it is cited. Lord Alverstone C.J. merely said that he thought the better view was that a payment in accompanied by an admission of liability should not be mentioned to a jury under Order XXII., r. 22.

Pritt K.C. replied.

Cur. adv. vult.

1937. Feb. 11. The following judgments were read :—

SLESSER L.J. [after stating the facts and the order of Hilbery J., continued :] The plaintiff appeals against this order on the ground that the judge, having heard that 20*l.* had been paid into Court, before he had given his final decision, was not competent thereafter to enter judgment for a sum different from that which he had stated orally to be due to the plaintiff before any mention of the payment into Court had been made to him.

(1) (1897) 14 Times L. R. 88. (2) 20 Times L. R. 563.

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It was not sought to be disputed by Mr. Pritt that it is within the power of a judge at any time before judgment is entered and perfected to alter its terms. This is the effect of two judgments, the case of *In re St. Nazaire Company* (1), in which case it was held, following *In re Australian Direct Steam Navigation Co., Millers'* case (2), that a judge can always reconsider his decision until the order has been drawn up, and the case of *In re Suffield & Watts*; *Ex parte Brown* (3), to the effect that "so long as the order has not been perfected the judge has a power of reconsidering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end." (Per Fry L.J. (4); per Lopes L.J. (5)) Faced with these decisions, Mr. Pritt advanced an argument based upon Order XXII., r. 6, of the Rules of the Supreme Court. That rule provides, with exceptions not here applicable, that "no statement of the fact that money has been paid into Court . . . . shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided." It is contended by Mr. Pritt that although on the question of liability the formal judgment on May 14 did not differ from the judgment on May 13, the amount of damages was not finally decided until the formal judgment on May 14 was drawn up and perfected, at which time communication of the fact that money had been paid into Court had been made to the judge in contravention of Order XXII., r. 6; and this contravention, he maintains, has produced such danger of miscarriage of justice by its very nature as to make necessary a new trial.

To test this matter, I will assume that the mention of the payment into Court had been made to a judge or jury before he delivered judgment in a case where the oral judgment and the written order agreed in all respects. In my opinion, in such a case, a departure from rule would not, of itself, compel

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(1) (1879) 12 Ch. D. 88.

(2) (1876) 3 Ch. D. 661.

(3) 20 Q. B. D. 693.

(4) 20 Q. B. D. 697.

(5) Ibid. 698.

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the judge to refuse to continue to hear the case, nor, if he did continue to hear it in his discretion would it be a ground for this Court to order a new trial. The part of the rule in my opinion dealing with this matter, like the earlier limb which says no mention of payment into Court shall appear in the pleadings, is directory and not compulsive; that is to say, a judge in his discretion, when such a matter was mentioned to him or the jury, if he were of opinion that the statement as to payment in could not reasonably be calculated to cause any miscarriage, would be entitled, notwithstanding the mention to allow the case to proceed. Order XXII., r. 6—the rule which now extends both to judge and to jury was formerly limited to the case of the jury only. Under the old r. 22 it was provided that where a cause or matter is tried by a judge and jury, no communication to the jury shall be made until after verdict is given either of the fact that money has been paid into Court or of the amount paid in. In *Klamborowski* v. *Cooke* (1), counsel had stated to the jury, in opening the pleadings, that the defendant had paid money into Court. This course was objected to by the defendant on the ground that it was contrary to Order XXII., r. 22, but Lord Russell of Killowen C.J., said that in his opinion the rule was a very foolish one and worked very inconveniently, and he, himself, told the jury that the defendant had paid 5*l.* into Court. In *Williams* v. *Goose* (2), the rule was stated by the Court to be one relating merely to procedure, and, on an argument that the rule was ultra vires on the ground that making rules under the Judicature Act is confined to matters of procedure and cannot be exercised so as to effect the substantive rights of litigants, it was decided that the rule, being merely procedural, was intra vires the Judicature Act.

In *Jaques* v. *South Essex Waterworks Co.* (3), Lord Alverstone C.J., in holding that Order XXII., r. 22, applied where payment in was accompanied by an admission of liability, merely added that he thought the better view was that it should not be mentioned.

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(1) 14 Times L. R. 88.
(2) [1897] 1 Q. B. 471.
(3) 20 Times L. R. 563.

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Finally, Mr. Pritt argued on construction that the application of Order XXII., r. 6, made it now impossible to say that when payment into Court had been mentioned to a judge, he could now draw up an order different from that contained in the oral decision which he had made before that mention. This contention cannot be supported on principle. If the right view is, as we are told by authority, that there is no effective judgment until it is drawn up and that up to that time the judge is not functus officio, such a basic notion cannot be upset by the mere application of an inference derived from the inconvenience of applying it in the circumstances contemplated by a particular rule. Whatever may be the merits of an argument supporting a new trial, the argument that the oral judgment is final in cases where payment in has been stated to the judge and not otherwise, is contrary to the very nature of a judgment.

This appeal therefore fails and must be dismissed with costs.

SCOTT L.J. I agree with the judgment of Slesser L.J., which has been delivered, and also with that of Farwell J., which I have had the privilege of reading. The rule says that no communication of the fact that money has been paid into Court under rr. 1 to 5 of Order XXII. shall be made to the judge or jury until all questions of liability and amount of debt or damages have been decided. It is to be observed that it applies, as did the old r. 22 before 1933, even where payment in is made with admission of liability. The prohibition is supported by no sanction: nothing is said as to what is to happen if the rule is broken.

It was argued by Mr. Pritt that a breach affected the jurisdiction of the judge to the extent of depriving him of his normal freedom to alter his oral judgment down to the moment of its being formally drawn up. But I cannot understand any such partial paralysis of jurisdiction: it must be all or nothing. However, even if his contention were right, the appellant could not succeed in her appeal, at most it would entitle her to a new trial.

But I do not think any such sanction can be read into the rule by implication. As the words stand, they constitute a direction to counsel, parties and witnesses, the observation of which the framers of the rule thought was generally in the interest of the administration of justice: and I think that a dereliction from the duty so indicated is an incident which the judge trying the case is left free to deal with in his complete discretion, acting under the inherent jurisdiction of the Court, according to the actual circumstances of the case in which the incident happens; and that that is so whether the trial be before a judge and jury or a judge alone.

It is to be observed that the rule does intend communication of the fact of payment in to be made before the judgment is perfected by entry; for it assumes that the judge will be told about payment in for the purpose of his order as to costs; and as the rule must have been drawn with an eye to the invariable practice of discussing costs immediately after delivery of the oral judgment of the Court, it follows that it could not have been intended to prejudice the power of the judge to alter his oral judgment at any time before it is formally drawn up and entered.

FARWELL J. This is an appeal from an order made by Hilbery J., dated May 14, 1936, whereby it was ordered that judgment be entered for the plaintiff for 35*l.* with such costs (to be taxed) as would have been allowed the plaintiff had the action been brought in the county court. The plaintiff appeals from that order and asks that in lieu thereof judgment should be entered for her for 50*l.* and costs.

The material facts stated quite shortly are these. The plaintiff complained in the action that she had suffered injury by the negligence of the defendants and claimed damages. The action was heard under the New Procedure Rules by Hilbery J. without a jury on May 13 and 14, 1936. On May 13, the learned judge, having heard the evidence, found that the plaintiff had been injured through the negligence of the defendants and stated that the damages should be 50*l.* with costs and he expressed the view that the action should have been brought in the county court, and that he would have liked to have limited the costs to county court costs. After the judge had stated his intention to award 50*l.* and costs, the defendants' counsel informed the judge that his clients had paid 20*l.* into Court. This statement was not made until after the judge had stated what he proposed to do, and no blame can attach to counsel for having made the statement then. On the following day, May 14, the matter again came before the learned judge, and he then said that he had given the case further serious consideration, and had come to the conclusion that the 50*l.* damages were excessive, and he finally awarded the plaintiff 35*l.* and costs on the county court scale, and it is against that order that this appeal is brought.

It is now well settled, that until an order made by a judge has been perfected, by being passed and entered, there is no final order, and consequently the judge may, at any time until the order is so perfected, vary or alter the order which he had intended to make: see *In re Suffield & Watts ; Ex parte Brown* (1) ; and no objection can therefore be taken, merely on the ground that the order, as drawn up, differs from the order that the learned judge originally stated he would make. It is said, however, that having regard to the provisions of Order XXII., r. 6, of the Supreme Court Rules, it was not open to the judge, after he had once been informed that money had been paid into Court, to deal with the matter any further, and that accordingly the order which he originally proposed to make must stand as the final order or that there should be a new trial. Order XXII., r. 6, provides: "Except in an action to which a defence of tender before action is pleaded or in which a plea under the Libel Acts, 1843 and 1845, has been filed, no statement of the fact that money has been paid into Court under the preceding rules of this Order shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided, but the judge shall, in exercising

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(1) 20 Q. B. D. 693.

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his discretion as to costs, take into account both the fact that money has been paid into Court and the amount of such payment." The prohibition contained in that order originally only applied in an action tried by a judge and jury, and had no application to a trial by a judge alone, but it has now been altered and applies in both cases.

The purpose of the order is obvious, it was made to prevent the premature disclosure of a fact which was not relevant to the issues to be tried, but the disclosure of which might prejudice one or more of the parties to the proceedings. It is to be noticed, that the order makes no express provision for the event of an infringement of the rule. It is of course the duty of both judge and counsel to observe the rule, but what is to be done if the rule by inadvertance or otherwise is broken? In my judgment, this is in every case a matter for the trial judge to determine, having due regard to the object for which the rule was made. If he thinks it proper or necessary for the due administration of justice, he may refuse to hear the action any further and direct it to be tried before another tribunal. On the other hand, if he is satisfied that no injustice will be done, he may allow the matter to proceed and if he adopts the latter course, that in itself affords no ground for an appeal from the order which is ultimately made.

In the present case, the only objection taken to the order made herein, is that it was made after the judge had been told that 20*l.* had been paid into Court, and as I have already said that alone is not sufficient to support this appeal, which in my judgment fails and should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Turner, Osborn & Chatterton.*
Solicitors for respondents: *William Easton & Sons.*

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[1935. F. 907.]

Libel—Privileged publication—Report in newspaper of judicial proceedings—Fair and accurate report—Application by person to Court for permission to make statement—Statement of a defamatory nature—Whether application formed part of judicial proceedings—Law of Libel Amendment Act, 1888 (51 & 52 *Vict. c.* 64), *s.* 3.

During the hearing of a libel action counsel for the plaintiff in his opening speech criticized the behaviour of a person D. The plaintiff, who was the only witness who gave evidence in the case, also commented adversely upon D.'s behaviour. Thereupon D. said to the judge: "May I make an application? I am the Rector of Stiffkey, and I want to contradict the many lies that have been told in this Court." That intervention was reported in five newspapers, and the plaintiff brought actions for libel against the proprietors of the five newspapers alleging that the reports in the newspapers were defamatory of him:—

Held, that the application which D. made to the Court was made in the course of proceedings publicly heard before a Court exercising judicial authority, and that it did not make any difference that in the course of the application defamatory matter was published about some one, and that as the report was a fair and accurate report and was published contemporaneously it was protected by s. 3 of the Law of Libel Amendment Act, 1888.

APPEAL from a decision of Macnaghten J. sitting with a special jury.

The plaintiff, Thomas Charles Farmer, brought actions for libel against the proprietors of five newspapers, The Birmingham Post, The Yorkshire Post, The South Wales Echo and Express, The Eastern Daily Press and The Yorkshire Evening Post, in respect of words which appeared in substantially the same form in all five newspapers. These actions were consolidated.

The plaintiff had previously brought a libel action against The Daily News and The Daily Telegraph in respect of a report of proceedings between the plaintiff and his wife which had been heard before the magistrates at Southend on June 29, 1934.

During the hearing of the police court proceedings and of that libel action the name of a Mr. Harold Davidson, who was formerly the Rector of Stiffkey, in Norfolk, was mentioned.

Serjeant Sullivan K.C., who appeared for the plaintiff in that libel action, criticized the behaviour of Mr. Davidson very severely in his opening speech, and the plaintiff, who was the only witness who gave evidence in that case, also commented adversely upon Mr. Davidson's behaviour.

Thereupon Mr. Davidson made an application to Hawke J., who was trying that action, in these words: "May I make an application? I am the Rector of Stiffkey, and I want to contradict the many lies that have been told in this Court."

That intervention was reported in the five newspapers, the proprietors of which were the defendants in the present action in substantially the same form. In The Eastern Daily Press the report was as follows:—

"It was when Mr. Terence O'Connor K.C. rose to open the defence that Mr. Davidson, who was wearing a clerical collar, stood up in Court and shouted: 'May I make an application?' 'Who are you, sir?' the judge demanded. 'I am the Rector of Stiffkey, and I want to contradict the many lies that have been told in this Court,' was the reply. 'You mean,' said Mr. Justice Hawke, 'that you are Mr. Davidson. Then you will sit down.' 'I have a precedent for it,' Mr. Davidson exclaimed."

The plaintiff thereupon brought actions for libel against the proprietors of the five newspapers reporting the matter and alleged that the reports in those newspapers were defamatory of him. He alleged that he was the only person who had given evidence in the Court at the time the statement of Mr. Davidson was made, and that Mr. Davidson's statement that he wanted to contradict the many lies that had been told in this Court could only refer to his evidence, and he alleged that what the words meant was that he was a liar and perjurer and a person who gave false evidence in a court of law.

The defendants said the words were not meant or intended or understood to bear, and were incapable of bearing, the meaning alleged or any meaning defamatory of the plaintiff. The defendants also relied by way of defence upon s. 3 of the Law of Libel Amendment Act, 1888, which provides that "A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged."

Macnaghten J., in summing up the case to the jury, in effect told them that if they took the view that Mr. Davidson was a person of such bad character that any possible damage which the plaintiff might suffer from being criticized by such a person could only be nominal then they could find a verdict for the defendants.

The jury returned a verdict in favour of the defendants, and judgment was entered accordingly.

The plaintiff appealed.

Martin O'Connor for the appellant. The learned judge in summing up the case to the jury misdirected them and therefore there ought to be a new trial. Davidson's statement that he wanted to contradict the many lies that had been told in the Court could only refer to the evidence given by the plaintiff, who was the only person who had given evidence in the Court. The plaintiff was not allowed by Macnaghten J. to call evidence showing the malice of Davidson towards the plaintiff. The evil reputation of the person making the statement alleged to be defamatory will not make the statement not defamatory. Scrutton L.J. in *Hobbs* v. *Tinling & Co., Ld.* said (1): " I am not aware of, and counsel was unable to refer me to, any reported case where it was held that, in the case of any prima facie defamatory statement, proof that the plaintiff had a bad reputation which could not be made worse was an answer to the action. It is, I think, generally assumed that the plaintiff proving a statement prima facie defamatory and unexcused by justification, privilege, or fair comment, is always entitled to nominal damages." The jury by reason of the misdirection did not consider the question of damages, and there ought to be a new trial to enable those damages to be assessed.

Sir William Jowitt K.C. and *H. C. Marks* for the respondents. The statement of Davidson that he wished to contradict the many lies that had been told in the Court did not necessarily refer to the plaintiff's evidence; it might refer to the very severe criticism of Mr. Davidson which had been made by Serjeant Sullivan K.C. in his opening speech for the plaintiff. Mr. Davidson might also have been protesting against the allegations made against him which had led to his being unfrocked. The summing up was not as clear as it might have been, but if the jury had been properly directed the result would have been that the jury would only have returned a verdict for the plaintiff for nominal damages and consequently this is a case for the application of Order XXXIX., r. 6, and a new trial ought not to be granted on the ground of misdirection as no substantial wrong or miscarriage of justice has been occasioned thereby.

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(1) [1929] 2 K. B. 1, 17.

[SLESSER L.J. If nominal damages might have been given by the jury to the plaintiff under a proper direction, might not the judge in that event have given the plaintiffs costs, and if so would not that misdirection amount to a substantial miscarriage of justice? In *Bray* v. *Ford* (1) the House of Lords granted a new trial in a libel action as the jury in assessing damages might have been influenced by the misdirection, and that amounted to a miscarriage of justice.]

Bray v. *Ford* (1) was a very different case from the present case. Here the plaintiff could only have recovered ½*d.* damages if the jury had been properly directed. Costs are merely incidental to damages and cannot be taken into consideration at all. The House of Lords held in *Lionel Barber & Co.* v. *Deutsche Bank* (2) that as a misdirection had occasioned no substantial wrong or miscarriage of justice a new trial ought not to be ordered, but that the judgment in the plaintiff's favour ought to be restored, subject to a reduction agreed to by the plaintiffs, and the House distinguished *Bray* v. *Ford* (1) and *Watt* v. *Watt.* (3) Although the mere fact that the jury awarded a plaintiff ½*d.* damages in an action for libel is not of itself good cause for depriving him of his costs, yet it is an important element to be taken into consideration

(1) [1896] A. C. 44.
(2) [1919] A. C. 304.
(3) [1905] A. C. 115.

if there are any other circumstances which can be taken into account—see Gatley on Libel and Slander (2nd ed.), p. 817.

The report in the newspapers of Mr. Davidson's application is protected by s. 3 of the Law of Libel Amendment Act, 1888, because it was a fair and accurate report of proceedings publicly heard before a Court exercising judicial authority and was published contemporaneously with such proceedings. If an application is made in open court the newspapers are entitled to report that application as having taken place in open court. The common law in this respect has shown itself capable of being altered. The standard laid down in the old cases would not be accepted to-day. It has been decided that if a man in a temper gets up and shouts out something in court, that observation does not form part of the proceedings of the court and a report of it will not be protected; but if a man asks to be allowed to make an application, his application can be reported. In *Delegal* v. *Highley* (1) Tindal C.J. said: " But it is an established principle, upon which the privilege of publishing a report of any judicial proceedings is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms strictly and properly the legal proceedings. The principle is so laid down in the case of *Lewis* v. *Clement* (2) and in other cases. But in the libel set out in the declaration, after the statement of the evidence given before the Lord Mayor, an observation is inserted of Mr. Hobler, the chief clerk, ' that it was exceedingly improper, under any circumstances, to obtain the signature of the complainant, a mere boy, to bills of exchange.' This appears to us to be a substantive reflection on the character and conduct of the plaintiff, which is altogether unwarranted, in two respects; it was not made in the course of any judicial proceeding, by any one whose duty called upon him to make it; it was uttered by a person who, for this purpose, must be considered as an entire stranger; it is the same as if made by any bystander in the court."

(1) (1837) 3 Bing. N. C. 950, 960.

(2) (1820) 3 B. & Ald. 702.

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Ryalls v. *Leader* (1) shows how the right to report proceedings in court has grown. It was there held that proceedings held in gaol before a registrar in bankruptcy, under the Bankruptcy Act, 1861, ss. 101, 102, upon the examination of a debtor in custody, were judicial proceedings and in a public court, and that, therefore, a fair report of these proceedings was protected. Bramwell B. said (2): "My opinion is, that when once you establish that a court is a public court, a fair bona fide report of all that passes there may be published." Justice should be publicly administered, and it is very desirable that members of the public who cannot attend a court should be put in the same position, through reading a report of the proceedings in a newspaper, as those members of the public who are present in court. It was laid down in *Wason* v. *Walter* (3) that a report in a public newspaper of a debate in either House of Parliament can be made and if accurate is privileged though it contains matter disparaging to the character of an individual. In *Usill* v. *Hales* (4) three men who believed themselves to be aggrieved by the conduct of the plaintiff in respect of a supposed claim upon him for wages or salary, applied to a magistrate in open court for a summons under the Master and Workman's Act. The magistrate declined to entertain the application, considering it a matter for a civil and not for a criminal court. The defendant afterwards published in a newspaper a report, which the jury found to be a fair report, of what passed before the magistrate, and it was held in an action for libel that the report was a privileged publication. In an Irish case, *Lynam* v. *Gowing* (5), there was a report of an inquest made by a coroner to the Chief Secretary for the Lord-Lieutenant of Ireland which included an observation made by a Roman Catholic clergyman in open court at the close of the plaintiff's evidence that part of it was "nothing short of perjury." In an action for libel against the coroner it was held that the defendant could not rely upon a plea that it was a fair report of judicial proceedings, inasmuch as the alleged libel was the communication of an unsworn defamatory statement made by a bystander, and formed no part of the proceedings at the inquest. The Law of Libel Amendment Act was passed in 1888. Thereafter it was held in *Kimber* v. *The Press Association* (1) that the publication, without malice, of a fair and accurate report of proceedings in open court, before magistrates, upon an ex parte application for the issue of a summons for perjury was privileged. Lord Esher M.R. said (2): "The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged. Under certain circumstances that publication may be very hard upon the person to whom it is made to apply, but public policy requires that some hardship should be suffered by individuals rather than that judicial proceedings should be held in secret." In *Hope* v. *Sir W. G. Leng and Co.* (*Sheffield Telegraph*), *Ld.* (3) a solicitor named Wilson sued Mrs. Hope, the plaintiff, on a bill of costs, and Mrs. Hope said that a report of those proceedings published by the defendants was a libel upon her. Mr. Wilson used the expression about "a pack of lies" not while he was a witness in the witness-box but after he had been sworn and in the course of the case. It was contended that as the observation made by Mr. Wilson was not made by him in the witness-box therefore a report of it did not come within the protection accorded to reports of legal proceedings. Collins M.R. said (4) that "he was not prepared to hold that an observation made by a litigant in a case when he was not actually in the witness-box could not be reported without risk of liability on the part of the reporter, if it was in fact made in court in the course of legal proceedings." The present case is distinguishable from those cases in which an observation was made by a bystander. Here an application was made to the court for permission to make a statement, and that application formed part of the proceedings of the court. It is not uncommon for such applications to be made to a court when reference has been made to individuals. *Delegal* v. *Highley* (1) would be decided differently if it arose to-day.

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(1) (1866) L. R. 1 Ex. 296.
(2) Ibid. 300.
(3) (1868) L. R. 4 Q. B. 73.
(4) (1878) 3 C. P. D. 319.
(5) (1880) 6 L. R. Ir. 259.

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(1) [1893] 1 Q. B. 65.
(2) Ibid. 68.
(3) (1907) 23 Times L. R. 243.
(4) Ibid. 244, 245.

[He was stopped.]

Martin O'Connor in reply. The Court of Appeal ought not to consider what was the proper assessment of damages in a case which was essentially within the province of the jury. What is within the province of a jury cannot be taken away from it: see *Watt* v. *Watt.* (2) The jury in this case upon a proper direction might have given more than ¼*d.* damages. The jury really did not consider the question of damages at all. To say what damages the jury would have awarded is to guess without any materials upon which to guess. The Court of Appeal has no jurisdiction to make any inquiry as to what damages a jury would be likely to give: *Bray* v. *Ford.* (3) In consequence of the misdirection the jury never addressed their minds to the question of damages, and there ought therefore to be a new trial as there has been a substantial wrong done to the plaintiff and a miscarriage of justice.

With regard to the defence of the Law of Libel Amendment Act, 1888, it would be an abuse of language to call the interruption by Mr. Davidson part of the proceedings of the court. It was an improper attempt by Davidson to vilify the plaintiff in the hope that it would be published. The reason for the decision in *Hope* v. *Sir W. G. Leng & Co.* (*Sheffield Telegraph*), *Ld.* (4) was that the party making the alleged defamatory observation had been sworn and had given evidence. The word "proceedings" in the Act of 1888 means an action or a step in an action. A person making an application to the court is not a party to an action. The interruption was an unjustifiable interference with the administration of justice. Sect. 3 of the Act of 1888 says that a fair and accurate report in any newspaper of proceedings publicly heard before any court shall be protected; it does not, however, say that the

(1) 3 Bing. N. C. 950.
(2) [1905] A. C. 115.
(3) [1896] A. C. 44.
(4) 23 Times L. R. 243.

report of an ex parte application to the Court shall be privileged. It was for the jury to decide whether a report of this interruption was a report of part of the proceedings of the court. The person making the application was not privileged from an action for slander because he was not a party to the action and a newspaper publishing a report of the application is not protected by s. 3 of the Act of 1888.

Slesser L.J. [after stating the facts set out above, continued :] Complaint has been made by Mr. Martin O'Connor that the learned judge in summing up the case misdirected the jury. I think, myself, that if Sir William Jowitt had been moved so to do (and if the result had been otherwise he might have done so), he also might have made certain complaints about the summing up of the learned judge. The matter which I think Sir William might properly have complained about was this, and I only mention it because it leads up to the subject of Mr. Martin O'Connor's complaint. It had been Sir William Jowitt's case, as indicated in his pleadings, in his speech to the jury, and in his cross-examination, that it by no means followed as a matter of course that because Mr. Davidson had said that he wanted to contradict the many lies that had been told in the court, those alleged lies had necessarily been told by Mr. Farmer at all, and secondly, that if Mr. Farmer had said that which was untrue, it might not be defamatory of Mr. Davidson and constitute his being a liar, but it might be Mr. Farmer's imperfect recollection or imperfect statement of matters which had happened long ago to Mr. Davidson in his various unhappy disputes with ecclesiastical and other authorities.

With regard to the allegation by Mr. Davidson that many lies had been told in the court, the point that Sir William Jowitt first made was that that might very well refer to the opening speech of counsel ; not, as Sir William was careful to point out, that counsel himself had deliberately lied, or even in fact lied, but that, acting under instructions, he might have said things which the sensitive nature of Mr. Davidson would construe as lies, and that therefore

Mr. Davidson's statement did not necessarily refer to the plaintiff at all. That point does not appear to me to have been put by the learned judge to the jury at all in his summing up. The learned judge seems to have assumed that the only person who could be affected by these observations in one way or another was Mr. Farmer. However, Sir William Jowitt has not complained of that matter.

Sir William Jowitt's second point—namely, that if Mr. Farmer, the plaintiff, was the person indicated, it would not follow that it was an accusation that Mr. Farmer was a liar—that point was put, I think, by the learned judge to the jury, when he said this : " If you attached any importance to what this interrupter of the proceedings said, would you think that what he meant was that he wanted to contradict the lies told about himself ; that he wanted to explain that the Bishop of Norwich was all wrong ; that he really was a person much misunderstood ; or would you think, as Mr. O'Connor suggested, that what he meant was that Mr. Farmer was a liar and a perjurer ? What Mr. O'Connor says is that the words meant that Mr. Farmer had told many lies ; that he had stated on oath what he knew to be false ; that he was a person who should not be believed upon his oath ; that he had been guilty of wilful and corrupt perjury ; and that he had wickedly sworn to facts which he knew were false, and that his evidence was false in many respects. If these words mean that, if you think that is the conclusion to which an ordinary person reading those words would come, that they meant that Mr. Farmer was a person who said that which he knew to be untrue in the witness-box, that would no doubt be a defamation of Mr. Farmer." So that I think that the learned judge did, perfectly clearly and unexceptionably, put before the jury the issue whether Mr. Davidson had or had not said that Mr. Farmer was a liar.

But unfortunately the learned judge did not leave it there. Sir William Jowitt had argued, quite properly, that the fact that Mr. Davidson was a person of very notorious reputation, who had been unfrocked as a priest and had suffered deprivation of his living, reduced any possible damage which the plaintiff might suffer by being criticized by such a person to a very small figure indeed, and that in substance he had suffered no damage at all. But, as I read the summing up of the learned judge, he unfortunately travelled beyond the submission which Sir William had made, and I think that in his summing up, fairly interpreted, he gave the jury the impression that if they took the view that Mr. Davidson was a man of very low character, so much so that the damage would be perhaps only nominal, then they could find a verdict for the defendant. The passages which at any rate might lead to that conception are these. First: "Sir William Jowitt said that there are some persons whose evil opinion you would regard as a compliment, and I take it that is so; there are persons, certainly, whose good opinion you would not desire. Mr. Davidson said: 'I want to contradict the many lies that have been told in this court'." Then, after putting the two views, as I have said, as to what Mr. Davidson in fact meant by saying that there had been lies told in the court, he went on in this way. After saying that if they took Mr. O'Connor's view that would be a defamation of Mr. Farmer, he went on: "But if, on the other hand, you think that ordinary persons reading these reports would not think any the worse of Mr. Farmer because of what Mr. Davidson had said—that is the point which is put in the defence: that no one would think any the worse of Mr. Farmer because this man who had been unfrocked had got up and had improperly in the course of the proceedings made this interjection, and had been requested to sit down—that is the question you will have to determine." That seems to me to be at least calculated so to confuse a jury, or to put before them two different tests upon which they were to decide for the plaintiff or for the defendant, as to be open to grave objection.

It is of course the law, as is stated by Scrutton L.J. in the case of *Hobbs* v. *Tinling & Co., Ld.* (1)—speaking there of the pleading, that "proof that the plaintiff had a bad reputation which

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(1) [1929] 2 K. B. 1, 17.

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could not be made worse was an answer to the action,"—"It is, I think, generally assumed that the plaintiff proving a statement prima facie defamatory and unexcused by justification, privilege, or fair comment, is always entitled to nominal damages." In other words, a plaintiff who proves a statement to be prima facie defamatory cannot be met, in answer to an action for at least nominal damages, by saying that the defendant has such a bad reputation that whatever he says is incapable of defaming anybody. It can, at the most, only go to the amount of damages.

Now it is impossible to tell whether the jury in this case in returning, as they did, a verdict for the defendant, proceeded upon the consideration which was a proper matter for their consideration—namely, whether Mr. Davidson was talking about himself and his history, or whether he was saying that the plaintiff was a liar and a perjurer. That matter may have been what they decided as to what they thought the words meant, and were capable of meaning, but they might have decided it on the other ground which was put to them by the learned judge—namely, that Mr. Davidson was a person of so low a reputation that really he could not defame the plaintiff. It is impossible to tell; and where the matter is quite open I am of opinion that upon the confusion in the summing up, it being impossible to say whether the jury proceeded to their conclusions on the part of the summing up which was satisfactory or on the part of the summing up which was impeachable, there would have to be a new trial.

The next point taken by Sir William Jowitt was that under Order XXXIX., r. 6, of the Rules of the Supreme Court a new trial should not be granted on the ground of misdirection unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been occasioned. He did not argue that the jury by their verdict—assuming that they had been properly directed—should return a verdict for the defendants merely because of the bad reputation of Mr. Davidson, but that they should return a verdict for nominal damages of one farthing. He contended that, either

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because the jury found for the defendants or because the most that they could give, if they acted on the part of the summing up which was correct, would be one farthing damages for the plaintiff, there was here no substantial miscarriage of justice.

I have come to the conclusion that that argument is not well founded in the present case. I think that a general consideration of the authorities leads one to the view that where you are dealing with general damages, and where, through misdirection or other impropriety in the case, it cannot be said that the jury have addressed their minds to the question of damages at all, it is not right for us to speculate as to what damages they would have given if they had received a proper direction. That view seems to me to be consistent with the various authorities to which we were referred, and I think it is quite clearly the result of the decision in the case of *Bray* v. *Ford*. (1) I think the later case of *Lionel Barber & Co.* v. *Deutsche Bank* (2), dealing as it does with a case where there could have been a dissection of the special damage, and where it was said that misdirection could not affect that matter, really does not deal with the point that we have here to consider. I think it is impossible to say, here, that a substantial miscarriage of justice has not occurred, not because the damages might be larger than one farthing but because the jury have never had an opportunity of assessing damages at all.

In those circumstances, Sir William Jowitt has to rely upon his statutory defence, and in my opinion that defence is a complete answer to the present action. By the Law of Libel Amendment Act of 1888, s. 3, it is provided that " A fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged." Now I ask myself whether this report, which was admittedly a fair and accurate report, was a report of proceedings publicly heard before any court ?

With regard to that, a number of cases were cited to us

(1) [1896] A. C. 44.

(2) [1919] A. C. 304.

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the effect of which appears to me to be this, that whenever something is done in the course of proceedings which is in any way related to the proceedings as such, and can be done in the proceedings, that may properly be said to be "proceedings publicly heard," and a report of it may be said to be protected. The cases range over a number of different matters, but it is perhaps convenient to deal with a case in which it was decided that something did not constitute a report of public proceedings, and that is an Irish case, *Lynam* v. *Gowing*. (1) That was a case where, there being an inquisition held by a coroner, Father Callary, a Catholic priest, stated in open court that part of the plaintiff's testimony was very little short of perjury. He had not been sworn as a witness, he was making no application to the court, and as I read the judgment his intervention was wholly irrelevant to the proceedings which were before the tribunal. The coroner transmitted to the Chief Secretary for the Lord Lieutenant of Ireland a report of the inquisition including the interruption of the priest. The plaintiff brought an action for libel against the coroner. As Dowse B. says (2): "The words alleged to have been used by Father Callary form no part of the proceedings of the coroner's court. In any well-regulated Court the person using these words would have been turned out of Court, or at the least reprimanded by the judge."

Now that case may be usefully contrasted with a case in which also observations were made, not in the witness-box, of a defamatory nature. In the case of *Hope* v. *Sir W. G. Leng & Co.* (*Sheffield Telegraph*), *Ld.* (3), a Mr. Muir Wilson, who had been sworn and had been a witness, shouted out from the body of the court, after his examination had been concluded, some defamatory matter. He said he had found that certain facts were false and a pack of lies from beginning to end. In that case, there being a report of these matters, the court, while doubting whether if he had not been a witness and had had no concern with the matter at all it would have

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(1) 6 L. R. Ir. 259.
(2) Ibid. 268.
(3) 23 Times L. R. 243.

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been privileged, came to the conclusion that it was privileged inasmuch as the statement made by Mr. Wilson was made after he had taken the oath, and might have been elicited by questions directed to him. Collins M.R. said (1): "It was a comment made by him when he was still under the obligation of the oath. It would be too nice to exclude from the privilege accorded to fair reports a report of an observation made under those circumstances."

The other line of cases which I think it is here material to consider is the class of case where a party has applied ex parte to magistrates or other authorities for some legal redress. Under this head I would mention the case of *Usill* v. *Hales*. (2) There three men who believed themselves to be aggrieved by the conduct of the plaintiff in respect of a supposed claim upon him for wages or salary, applied to a magistrate in open court for a summons under the Master and Workman's Act. The magistrate declined to entertain the application, considering it a matter for a civil and not for a criminal court. The defendant afterwards published in a newspaper a report, which the jury found to be a fair report, of what passed before the magistrate, and it was held that it was a privileged publication. It appears that in that case there was really a claim for breach of contract, but the three men had sought to promote a criminal process, and there the court had no jurisdiction, and the application had in law improperly been made by them. Nevertheless the court held that the matter could properly be said to arise in judicial proceedings. It was said by Lopes J. (3) that "on principles of public convenience, the ordinary rule is that no action can be maintained in respect of a fair and impartial report of a judicial proceeding, though the report contain matter of a defamatory kind and injurious to individuals. It was urged that the matter in respect of which the application was made was not within the jurisdiction of the magistrate. But the cases are clear to show that want of jurisdiction will not take away the privilege, if it is maintainable on other grounds.

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(1) 23 Times L. R. 245.
(2) 3 C. P. D. 319.
(3) 3 C. P. D. 328.

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Nor do I think the privilege is confined to the Superior Courts."

Now in the present case the application which Mr. Davidson made to the Court was, in my opinion, clearly made in the course of the proceedings. Mr. Martin O'Connor has tried to impress upon us the fact that the application was of a malicious kind, and contained defamatory matter. Of course, s. 3 of the Act of 1888 is based upon the assumption that something defamatory will be said in the course of proceedings, because otherwise it would not be necessary to seek its protection; but I think the right way to look at the matter is to consider what would have been the result, if the application had been made without any reference to lies at all, and Mr. Davidson had merely said: "May I make an application? I am the Rector of Stiffkey, and I want to contradict the statements that have been made in this Court," instead of using the word "lies." In such a case we should be brought within the ambit of cases which are constantly happening in the Courts, in which parties, either by themselves or by counsel, seek, either with or without success—but generally, I think, without—to persuade the learned judge to allow a statement to be made on their behalf. Strictly speaking, although the judge may have jurisdiction to hear them, he has no jurisdiction to decide anything, because there is no issue and no lis in which they are concerned. Nevertheless, it is clear to my mind that such an application would be made "in the course of the proceedings," nor does it, in my opinion, make any difference that in the course of the application defamatory matter is published about somebody else, which is the matter with which the section deals, or that the application is made with a malicious intent. It may be that the workmen in *Usill's* case (1) may have wanted to embarrass the employers by making the application which they made.

It is sufficient for us to consider whether this application which was made to the judge by Mr. Davidson—not interposed by a bystander in the Court, as in the Irish case (2)—was in the nature of proceedings publicly heard before any Court

(1) 3 C. P. D. 319.

(2) 6 L. R. Ir. 259.

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exercising judicial authority. I think it was, and so far as these newspapers are concerned the reports in the newspapers were fair and accurate reports of those proceedings, and consequently the statute affords to the owners of those newspapers a complete protection. For that reason I think that this appeal must fail.

GREENE L.J. I agree.

LUXMOORE J. I agree and have nothing to add.

Appeal dismissed.

Solicitors for appellant: *Vivian J. Williams & Co.*
Solicitors for respondent: *Theodore Goddard & Co.*

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Oct. 30;
Nov. 2, 3;
Dec. 17.

Ship—Salvage—Salvage services by H.M. ships—Previous contract to render such services—Validity—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 557—*Merchant Shipping* (*Salvage*) *Act,* 1916 (6 & 7 *Geo.* 5, *c.* 41), *s.* 1.

By s. 557 of the Merchant Shipping Act, 1894: "Where salvage services are rendered by any ship belonging to [His] Majesty . . . . no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to [His] Majesty, supplied in order to effect those services, or for any other expense or loss sustained by [His] Majesty by reason of that service . . . ."

The owners of the motor vessel *Valverda*, being informed that the ship was on fire, made a contract in writing with the Admiralty that warships belonging to His Majesty should render salvage services. Such services, including towage, were in fact rendered:—

Held, by the Court of Appeal (Slesser and Scott L.JJ., Greer L.J. dissenting) that it was not open to the parties by a contract otherwise valid to contract out of the provisions of the section.

Per Slesser L.J. on the ground that the effect of s. 557 of the Merchant Shipping Act, 1894, was to take away from the Crown the right to claim for salvage services which it might otherwise possess; that the prohibition to claim for salvage services was general in its nature and not enacted solely for the benefit of those persons who were to receive the services and accordingly could not be waived, and that the Court had no jurisdiction to entertain a claim for services excluded by the section.

Per Scott L.J. on the ground (1.) that the agreement ought to be construed as an undertaking to pay such salvage remuneration as was not barred by the combined operation of the two Acts of 1894 and 1916 and no more; (2.) that s. 557 of the Act of 1894 must be interpreted as meaning that the banned claims were not to be allowed in the King's Courts, and that therefore no cause of action for any of the banned heads of remuneration could exist; (3.) that even if there was any ambiguity in the construction of s. 557, the crucial words in it ought to be construed as a prohibition, and that the Admiralty could not make an agreement for the express purpose of creating by contract a cause of action for salvage remuneration falling within the statutory ban enforceable in the Courts notwithstanding the statute.

Greer L.J. held that there was nothing in s. 557 of the Merchant Shipping Act of 1894 which made it illegal for the Admiralty to agree that if they did what they were not bound to do, i.e., stand by a ship and tow her to safety, they were to receive remuneration, or which rendered a promise to pay for such services made by

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the owners of the salved ship illegal and void, and that therefore the contract which the owners of the salved ship entered into with the Admiralty was a binding contract.

Decision of Branson J. [1936] 1 K. B. 724 reversed.

APPEAL from a decision of Branson J. (1) upon a special case stated by an arbitrator.

The appellants (called herein "the owners") were the owners of the motor vessel *Valverda*, 8806 tons gross, manned by a crew of 36 hands. On January 21, 1935, while the *Valverda* was on a voyage from Curaçao to Land's End, a fire broke out in her engine-room, and an S.O.S. signal for assistance was sent out. To this signal H.M.S. *Frobisher*, a cruiser, and H.M.S. *Guardian*, a cruiser, responded, and the *Frobisher* on and from January 22 towed the *Valverda* to Bermuda, some 800 or 900 miles, arriving on February 1. On January 23 the owners in Glasgow had telephoned to the Admiralty, who informed them of the position. In the result an agreement, being the Admiralty standard form of salvage agreement, was signed on January 25 by representatives of the owners and of the Admiralty.

The arbitrator found as a fact that the agreement was entered into voluntarily with full knowledge that the *Frobisher* and the *Guardian* were assisting the *Valverda*. He further found that the owners in entering into the agreement made no suggestion that any distinction should be drawn between the classes of Admiralty vessels which might participate in the services. He also found that the services rendered by the salving vessels were difficult and dangerous and involved serious risk to the salving vessels.

The agreement was dated January 25, 1935. The material clauses of the agreement were as follows:—

Cl. 1. "The Admiralty agree to use such endeavours as they or their officers may in their absolute discretion think fit to salve or assist the ship *Valverda* and her cargo and freight if any, and the Master (or Owner) hereby engages the services of the Admiralty for such purposes. . . . . It is hereby agreed that all the provisions of this agreement shall apply

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(1) [1936] 1 K. B. 724.

[to services already rendered] as if they had been wholly rendered after the signing of this agreement.

Cl. 3. "The remuneration under this agreement for any services rendered shall, unless agreed with the Admiralty, be fixed by arbitration in London, as hereinafter provided.

Cl. 4. "The remuneration shall, if the services are successful or beneficial, consist of a reasonable amount of salvage.

Cl. 5. "If the services are not successful or beneficial, then the actual out-of-pocket expenses incurred by or on behalf of the Admiralty in the endeavours to salve or assist the said ship and her cargo and freight, together with compensation not exceeding 350*l.* for any loss or damage incurred in such endeavours, shall be the measure of the remuneration payable to the Admiralty under this agreement, but there shall not be included in the said expenses or compensation any charge for the use of any ship or tug belonging to His Majesty.

Cl. 6. "The Admiralty shall, after the termination of the services, notify the Committee of Lloyd's of the amount for which the Admiralty may require security to be given. . . . .

Cl. 7. "Pending the completion of the security as aforesaid the Admiralty shall have a maritime lien on the property salved for their remuneration and the Master (or Owner) hereby undertakes not to remove or to permit the removal without the consent of the Admiralty of the property salved or any part thereof from the port of or the place of safety to which the property is taken or at which it is left by the Admiralty on the completion of the salvage services until security has been given to the satisfaction of the Committee of Lloyd's. In consideration of this undertaking the Admiralty engage not to arrest or detain the property salved unless the security be not given within 14 days of the termination of the services or the Admiralty have reason to believe that the removal of the property salved is contemplated contrary to the above undertaking.

Cl. 8. "The amount of the remuneration payable under this agreement, and any other question which may arise out of this agreement, shall be referred to the sole arbitration of an arbitrator to be appointed by the Committee of Lloyd's."

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In addition to the *Frobisher* and *Guardian*, the following Admiralty ships also rendered services to the *Valverda:* H.M.S. *Sandboy* and H.M. yard craft *Creole.* R.F.A. *Orangeleaf* was also sent out to the *Valverda* from Bermuda with necessary apparatus to tow her if necessary and with oil to refuel her. In fact it was found unnecessary to use the *Orangeleaf*, but she was absent from Bermuda for eight days, and the arbitrator found as a fact that it was reasonable to send her out. The *Sandboy* and the *Creole* were tugs or vessels "specially equipped with salvage plant" within s. 1 of the Merchant Shipping (Salvage) Act, 1916. The *Frobisher* and the *Guardian* were not within that section.

The owners admitted that salvage services were rendered to the *Valverda* by the *Frobisher, Guardian, Sandboy* and *Creole,* but denied that services were rendered by the *Orangeleaf.* They admitted that the Admiralty were entitled to claim salvage in respect of the services of the *Sandboy* and *Creole,* but denied that they were entitled to claim salvage in respect of the *Frobisher* and *Guardian.* They admitted that the officers and crews of the four last-named ships were entitled to salvage remuneration.

The Admiralty contended that by virtue of the terms of the contract of January 25, 1935, they were entitled to claim in respect of the services of all five ships.

The arbitrator held that the Admiralty were entitled to salvage in respect of all five ships and awarded 11,000*l.* In the alternative, if the Court should be of opinion that the Admiralty were not entitled in respect of the *Frobisher, Guardian* and *Orangeleaf,* he awarded 6500*l.*

Branson J. upheld the award of the arbitrator and held that notwithstanding the provisions of s. 557 of the Merchant Shipping Act, 1894 (1), it was open to the parties by a contract

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(1) Merchant Shipping Law Amendment Act, 1853 (16 & 17 Vict. c. 131), s. 40 (in error printed as 39) (repealed by 17 & 18 Vict. c. 120 and re-enacted by 17 & 18 Vict. c. 104, s. 484). This was repealed by 57 & 58 Vict. c. 60, s. 745, and Sch. XXII., and is now re-enacted in the following section of that Act:—

Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 557: "(1.) Where salvage services are rendered by any ship belonging to

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otherwise valid to contract out of the provisions of the section and for the owners thereby to waive the benefit conferred upon them by the section.

The owners of the *Valverda* appealed.

Carpmael K.C. and *H. G. Willmer* for the appellants. The decisions of the arbitrator and of Branson J. were wrong. It is true that before 1853 the Admiralty could claim salvage, but in fact there is no case except H.M.S. *Thetis* (1) in which the Admiralty claimed salvage. In that case the salvage occupied a period of eighteen months, and the Admiralty were awarded 13,000*l.* for out-of-pocket expenses, but not for salvage. Until the advent of steam vessels salvage services consisted almost entirely of personal services ; there could be no towage in the case of sailing ships. There was no claim by the Admiralty for the use of H.M. ships, but the officers and crews of those ships were entitled, if they had obtained the consent of the Admiralty, to a salvage award for their personal services. The statute 13 Anne, c. 21, laid a duty upon the commander and officers of men-of-war as well as of merchant ships to give

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[His] Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to [His] Majesty, supplied in order to effect those services, or for any other expense or loss sustained by [His] Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew of any of [His] Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved."

"(2.) Any document purporting to give the consent of the Admiralty for the purpose of this section, and to be signed by the Secretary to the Admiralty or on his behalf, shall be evidence of that consent."

"(3.) If a claim is prosecuted and the consent is not proved, the claim shall stand dismissed with costs."

Merchant Shipping (Salvage) Act, 1916 (6 & 7 Geo. 5, c. 41), s. 1 : "Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in section 557 of the Merchant Shipping Act, 1894, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty."

(1) (1833) 3 Hag. Adm. 14.

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salvage assistance to vessels in distress, and the Act prescribed the payment of a reasonable reward to the salvors. After the passing of that statute it was always regarded as a duty upon officers of King's ships to render salvage service, and that is probably the reason why the Admiralty never claimed for salvage service rendered by the King's ships, although there are a large number of cases in which claims for salvage are made for the personal services of officers and men of H.M. ships: see *The Louisa* (1); *The Mary Ann* (2); *The Lustre* (3); *The Ewell Grove* (4); *The Rapid* (5); *The Wilsons* (6); *The Iodine* (7); *The Charlotte Wylie* (8); *The Rosalie*. (9) In *The Lord Dufferin* (10) it was said by the Chief Justice of Bombay that if the Government assisted a merchantman in distress and subsequently brought a claim for salvage reward it would probably be held that the Government were entitled to claim salvage. But those remarks were obiter, as the claim there was for salvage by the officers of an East Indiaman and not by a King's ship. Sect. 40 of the Merchant Shipping Act, 1853, which is now represented by s. 557 of the Merchant Shipping Act, 1894, enacted that no such claim for salvage by Her Majesty's ships should be allowed. The provisions of that statute have been considered in many cases, but in no case has a claim for salvage been put forward by the Admiralty except in cases coming within s. 1 of the Merchant Shipping (Salvage) Act, 1916, which is not applicable to the claims in respect of the *Frobisher*, *Guardian* and *Orangeleaf* in the present case. The cases since 1853 have been chiefly claims for salvage in respect of personal services: *The Earl of Eglinton* (11); *The Alma*. (12) In *Cargo ex Woosung* (13) the services rendered were personal services in salving cargo, and the question was whether an agreement by which the

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(1) (1813) 1 Dods. Adm. 317.
(2) (1823) 1 Hag. Adm. 158.
(3) (1834) 3 Hag. Adm. 154.
(4) (1835) 3 Hag. Adm. 209.
(5) (1838) 3 Hag. Adm. 419.
(6) (1841) 1 Wm. Rob. Adm. 172.
(7) (1844) 3 Notes of Cases, 140.
(8) (1846) 5 Notes of Cases, 4.
(9) (1853) 1 Spinks Ecc. & Adm. 188.
(10) (1849) 7 Notes of Cases, Supp. xxxiii.
(11) (1855) Swabey Adm. 7.
(12) (1861) Lush. Adm. 378.
(13) (1876) 1 P. D. 260.

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salvors were to be paid one-half of the proceeds of the cargo salved was valid, and it was held by the Court of Appeal that the agreement could not stand. In *The Dalhousie* (1) Sir R. Phillimore said that " the steamer, being in the Queen's service, could not be considered as a salvor." In *The Cybele* (2) salvage services were rendered by a vessel belonging to Ramsgate Harbour and vested in the Board of Trade under the Harbours and Passing Tolls Act, 1861. It was held by the Court of Appeal, affirming Sir R. Phillimore, that the vessel was not a ship belonging to Her Majesty within the meaning of ss. 484, 485 of the Merchant Shipping Act, 1854, and that therefore the Board of Trade were not precluded from recovering salvage. In *The Sarpen* (3) the plaintiffs' tug *Simla*, which had been requisitioned by the Admiralty, rendered valuable salvage services to the *Sarpen*. It was held that the effect of the requisitioning by the Admiralty did not make the *Simla* a ship belonging to His Majesty within s. 557 of the Merchant Shipping Act, 1894, and that therefore the owners, master and crew were entitled to prosecute a claim for salvage. Pickford L.J. there dealt with the reason why the Crown was not in so good a position as other salvors in claiming salvage, and said (4): " Probably the reason of the provision [s. 557 of the Merchant Shipping Act, 1894] is that it is not considered right that risk or loss to property provided by the public should be paid for by a member of that public " and Bankes L.J. (5) spoke of " the disabilities, so far as salvage services are concerned, of one of His Majesty's ships." It was held in *The Matti* (6) that the ship, which had rendered salvage services, was a ship belonging to His Majesty within the meaning of s. 557 of the Merchant Shipping Act, 1894, and that therefore the Admiralty were precluded from claiming salvage. In *Admiralty Commissioners* v. *Page* (7) a tug, which was requisitioned by the Admiralty upon terms which amounted to a demise of the tug to the Admiralty, rendered salvage

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(1) (1875) 1 P. D. 271.

(2) (1877) 2 P. D. 224; (1878) 3 P. D. 8.

(3) [1916] P. 306.

(4) [1916] P. 316.

(5) Ibid. 323.

(6) [1918] P. 314.

(7) [1918] 2 K. B. 447.

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services in respect of which a salvage award was made. It was held that the tug was a ship belonging to His Majesty within the meaning of s. 1 of the Merchant Shipping (Salvage) Act, 1916, and that therefore the Admiralty, and not the owners of the tug, were entitled to the salvage award. In *The Morgana* (1) it was held that a cable ship belonging to the Admiralty which had rendered salvage services was not specially equipped with salvage plant within s. 1 of the Merchant Shipping (Salvage) Act, 1916, and that therefore the Admiralty were not entitled to claim salvage remuneration in respect of the services of the vessel. The question as to the right of the Admiralty to receive payment for the use of His Majesty's ships was raised incidentally in *China Navigation Co.* v. *Attorney-General.* (2) The origin of salvage was considered in *The Gas Float Whitton* (*No.* 2) (3), and it was stated that it was derived from the civil law: see also *The Calypso.* (4) There is nothing in the Laws of Oleron or in Blackstone which lends support to the right of the Crown to claim salvage remuneration for salvage services rendered by His Majesty's ships. The effect of s. 557 of the Merchant Shipping Act, 1894, as interpreted by the Court of Appeal is that the Admiralty is not entitled to claim salvage remuneration for salvage services rendered by His Majesty's ships other than those which come within the Merchant Shipping (Salvage) Act, 1916, and any agreement to the contrary effect would not be enforceable: see Leake on Contracts (8th ed.), p. 535. The parties cannot by a private agreement alter the legal position, which is one of prohibition. Sect. 557 of the Act of 1894 was intended to lay down a rule of public policy, and it is impossible for either party to contract himself out of it or to waive its effect. Effect can be given to the agreement by confining it to remuneration for those salvage services which can be legally claimed by the Admiralty under the Act of 1916 and by the officers and crew under s. 557 of the Act of 1894.

(1) [1920] P. 442.

(2) [1932] 2 K. B. 197, 207, 216, 231, 241–2.

(3) [1897] A. C. 337, 340.

(4) (1828) 2 Hag. Adm. 209, 218.

G. St. C. Pilcher K.C. and *Owen L. Bateson* for the respondents, the Admiralty Commissioners. There is no duty upon a King's ship to render assistance to a vessel in distress. Salvage services must be rendered voluntarily, and if services are rendered in compliance with some duty to render them they are not rendered voluntarily and are not salvage services. When Lord Stowell in *The Louisa* (1) said it was " the duty of King's ships to afford assistance to all His Majesty's subjects whom they may meet with in distress " he was referring to a moral duty, not to a legal duty. There is no legal duty upon the commander and officers of a King's ship to render assistance to a vessel in distress: see *The Lustre.* (2) From 1852 instructions have been issued to the officers of King's ships that they must render assistance to ships in distress. There was no duty on the *Frobisher* to stand by the *Valverda*; both ships were in communication with the Admiralty and the owners, and the agreement which was signed on behalf of the owners was similar to the ordinary Lloyd's salvage agreement. That agreement is only consistent with the view that the Admiralty are just as much entitled to claim salvage as the owners of other ships. It is clear that a claim by the Crown for the use of the King's ships was recognized as one that could be made. Dr. Lushington in *The Iodine* (3) said "that where a service is done, and there is personal risk and labour, Her Majesty's officers and seamen are entitled to be rewarded precisely in a similar manner, on the same principles, and in the same degree, as where any other persons render that service. But, with regard to the use of the vessel, a different consideration would apply, and a less remuneration would always be made, on account of the vessel being the property of the country, and the property of owners under these circumstances never being risked." That passage was cited by Bankes L.J. in *The Sarpen.* (4) It is true that the Admiralty have never claimed salvage except in the case of *The Matti.* (5) The only case prior to 1853 in which the Admiralty claimed salvage was H.M.S. *Thetis* (6), and there they only claimed out-of-

(1) 1 Dods. Adm. 317, 318.
(2) 3 Hag. Adm. 154.
(3) 3 Notes of Cases, 140, 141.
(4) [1916] P. 306, 320.
(5) [1918] P. 314.
(6) 3 Hag. Adm. 14.

pocket expenses. It is true that since 1853 all the judges appear to have regarded s. 40 of the Act of 1853, now s. 557 of the Act of 1894, as a complete bar to a claim to salvage by the Admiralty; but their remarks to that effect were obiter and not binding, as the point was not before them for consideration. It was clearly the intention of the parties in entering into the agreement in the present case that the Admiralty should be entitled to salvage. It is now the practice to award salvage where services are rendered at request: *The Stiklestad.* (1) The Admiralty sometimes insisted upon an indemnity for out-of-pocket expenses being given before they would allow their stores and men to be used for salvage service: see *The Ewell Grove* (2); *The Lustre.* (3) It is true that form D.46—the form of agreement used in the present case—is a form used by vessels specially equipped within the 1916 Act, but it is equally capable of being used by all Admiralty vessels. There was no obligation upon the officers and men of King's ships to go to the assistance of the *Valverda,* and no obligation upon the Admiralty to allow their ships to render salvage services, and they might say that they would not do so unless the owners of the ship in distress entered into an agreement to pay for the salvage services. Having entered into a contract to pay salvage the owners of the *Valverda* are not entitled now to say that salvage is not recoverable. "As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shewn that such an agreement is in the circumstances of the particular case contrary to public policy": Halsbury's Laws of England (2nd ed.), vol. 7, p. 168. The Workmen's Compensation Act, 1925, provided by s. 1, sub-s. 3, that "This Act shall apply notwithstanding any contract to the contrary. . . . ." The language of s. 557 of the Merchant Shipping Act, 1894, is apposite to dealing with claims for salvage by sailing vessels or by steam vessels doing no towage. Before 1853 steam power did not enter much into consideration, but in *The Spirit of the Age* (4) Dr. Lushington said: "We all know

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(1) [1926] P. 205.
(2) 3 Hag. Adm. 209, 224.
(3) 3 Hag. Adm. 154.
(4) (1857) Swabey Adm. 286.

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that formerly claims of owners of vessels to participate in salvages did not receive very favourable attention from the judges who preceded me in this chair: but since then things are much changed; steamers are able to render important salvage services, in which the ship herself is the chief agent." When the section was drafted Parliament left out of consideration the fact that the use of a steam vessel might be an effective agent of the salvage. In the present case the *Frobisher* towed the *Valverda* nearly 1000 miles to Bermuda, and the officers and crew of the *Frobisher* took only a minor part in the salvage. The effective cause of the salvage was the use of the *Frobisher* herself. Sect. 557 of the Act of 1894 does not say that salvage shall not be given in respect of the benefit conferred upon the salved property by reason of the salvage services, but merely that no claim shall be allowed for any risk to the ship or stores or for out-of-pocket expenses by reason of the salvage services. The fact that it was the practice of the Admiralty prior to 1853 not to claim for salvage services does not prove that the Admiralty had not the right to make a claim for those services. The section does not prevent an agreement for payment for salvage services being entered into. The claim referred to in s. 557 is a claim for salvage where no contract to pay for salvage services has been made; in the present case the claim is made on an express contract to pay for salvage services.

The Admiralty were entitled to make this contract for payment for salvage services. "Persons for whose benefit statutory duties have been imposed may, in the absence of express words in the statute to the contrary, contract with those on whom such duties are laid not to lay claim to the performance of them": Halsbury's Laws of England (1st ed.), vol. 27, p. 196. On the other hand "a contract involving the doing of an act forbidden by statute is, like any other contract which is contrary to law, unenforceable, and no action will lie upon it": Ibid. p. 193. There is no authority for the proposition that a prohibition of the kind set out in s. 557 of the Act of 1894 cannot be contracted out of. In the absence of a prohibition against contracting out of the statute there is no public policy which prevents contracting out.

[SLESSER L.J. referred to *S. Pearson & Son, Ld.* v. *Dublin Corporation.* (1)]

All the judges in *Midland Ry. Co.* v. *Withington Local Board* (2) appeared to think that the protection given by s. 264 of the Public Health Act, 1875, might be waived. It was held in *Griffiths* v. *Earl of Dudley* (3) that a contract by a workman with his employer not to claim compensation under the Employers' Liability Act, 1880, for personal injuries was not against public policy. There the workman by contract gave his employer a defence which the statute said he should not have. The Carriage of Goods by Sea Act, 1924, by Art. III., r. 6, provides that in any event the carrier shall be discharged from liability for any loss or damage unless the action is brought within one year. That rule is a complete bar to an action after the lapse of a year, but that provision is habitually contracted out of. On the other hand Art. III., r. 8, which provides that a contract to a contrary effect to the rule shall be null and void and of no effect, cannot be contracted out of. There was no obligation on the Admiralty to allow their ships to render salvage services, and the entering by them into a contract with a ship in distress to render such services upon the owners undertaking to pay for such services is not a breach of the prohibition contained in s. 557 of the Act of 1894. The agreement is quite clear and wide enough to cover salvage services by all the ships. There is no rule of public policy against contracting out of the statute. In any event s. 557 does not profess to deal with all the elements of salvage and does not deal with the benefits conferred on a salved ship, and the case ought to go back to the arbitrator for him to assess the value of the benefits conferred upon the salved ship.

Carpmael K.C. in reply. The King's Regulations by art. 1889 impose an obligation on the commander and officers of men-of-war to render assistance if possible to vessels in distress. That duty is not an absolute duty as it is not enforceable by operation of law. The Attorney-General told the arbitrator that s. 557 of the Act of 1894 did not deal with all of the

(1) [1907] A. C. 351, 367, 368.
(2) (1883) 11 Q. B. D. 788, 795, 796; 52 L. J. (Q. B.) 689, 693, 694.
(3) (1882) 9 Q. B. D. 357.

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aspects of salvage as it did not take into account the benefit conferred upon a salved vessel, but the arbitrator was not asked to make an alternative award on that basis. It was decided in *The Matti* (1) and *The Morgana* (2) that the Admiralty cannot claim for salvage by reason of s. 557. The Admiralty could make a common law agreement for payment for towage but not for payment for salvage services. Sect. 557 was framed as it was because previous to 1853 the Admiralty had no right to payment for salvage services but only for out-of-pocket expenses. Dr. Lushington said in *The Alma* (3) that "By the Merchant Shipping Act no salvage can be recovered for the mere use of Her Majesty's ships or stores, and the claims of the plaintiffs are therefore limited to their personal services."

[SLESSER L.J. If a provision that a claim shall not be brought except within a limited time can be waived, why cannot a provision that a claim shall not be brought, without any time limit being mentioned, equally be waived?]

A defence based upon the Public Authorities Protection Act, 1893, must be pleaded, and if it is not pleaded there is no reason why the Act cannot be relied upon. Lord Blackburn said in *Maddison* v. *Alderson* (4): "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." There are dicta in *Morris* v. *Baron & Co.* (5) to the same effect. In s. 557 of the Act of 1894 there is no limitation of time fixed within which a claim may be made; there is an absolute prohibition of an action for salvage being brought at all, and an absolute prohibition cannot be waived. It is true that a benefit conferred by a statute can be waived; but s. 557 does not come within that principle, as it does not confer a benefit, and therefore the question of waiver does not arise. A contract which involves in its performance, either directly or collaterally, the doing of something which would be in contravention of a statute which created duties or imposed obligations

(1) [1918] P. 314.
(2) [1920] P. 442.
(3) (1861) Lush. 378, 381.
(4) (1883) 8 App. Cas. 467, 488.
(5) [1918] A. C. 1, 11, 15, 23, 30, 40.

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(whether they be obligations to do or to refrain from doing some particular thing) is invalid and unenforceable: see Craies on Statute Law (4th ed.), p. 223. "The parties cannot by consent confer a jurisdiction which does not exist": per Bramwell L.J. in *Foster* v. *Usherwood.* (1) The parties in the present case were not contracting with the intention to waive their rights under s. 557. It was not intended that the contract should have an illegal effect. If the claim by the Admiralty for salvage should succeed it would nullify the Acts of 1894 and 1916.

Cur. adv. vult.

1936. Dec. 17. The following judgments were read:—

GREER L.J. Before the Statute of Queen Anne's reign, 12 Anne, Stat. 2, c. 18 (Ruffhead), or (according to the Statutes of the Realm) 13 Anne, c. 21, no private ship or Queen's ship was under any duty to assist vessels in distress. This statute imposed a duty which was to last for three years. This statutory duty was continued for a further period and then repealed. It is, therefore, necessary to consider what, if any, was the duty of the King's ships at common law before the Merchant Shipping Act of 1853.

In *The Mary Ann* (2) Lord Stowell in giving his judgment said: "In this case a demand is made for the remuneration of salvage services, which have been meritoriously effected by the commander and crew of H.M. sloop *Arab;* and, undoubtedly, the parties may fairly claim a remuneration, although the ship belongs to the State, and although there is an obligation upon King's ships to assist the merchant vessels of this country; yet, when services have been rendered, those who confer them are entitled to an adequate reward."

In H.M.S. *Thetis* (3) a claim was made on behalf of the officers for salvage remuneration, and on behalf of the Admiralty for expenses to the amount of 13,833*l.*, incurred for pay, etc., in H.M. ships *Lightning*, *Adelaide*, and *Algerine*. The Admiralty were separately represented. In giving judgment

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(1) (1877) 3 Ex. D. 1, 3.

(2) 1 Hag. Adm. 158.

(3) 3 Hag. Adm. 14.

Sir Christopher Robinson said (1): "The claim on the part of the Admiralty for the wages and victualling of the men, and for the wear and tear of the ships, has been in some degree resisted on the part of the salvors; and it is said to be unprecedented; but I do not know that it can be essentially distinguished from claims of owners for demurrage and repairs, in cases of private salvors; and such claims have constantly been allowed. The claim is more novel in form than in principle, and new classes of cases may be expected to require new rules. The Lords of the Admiralty are but trustees for the public, in regulating the employment of H.M. ships; and they must act as they think proper in regard to the terms on which they may be permitted to engage in such services as these. There is, undoubtedly, a difference between the assistance afforded in ordinary cases, by public vessels, for which nothing has hitherto been charged, and the appropriation of them with additional supplies of men and stores, to a service of this kind, for eighteen months together. I am, however, not called upon to give any opinion on this claim, as it is not opposed, but admitted, on the part of the owners and of the Admiral; and I think the salvors have no reason to complain of being so supplied with the means of effecting this service."

I regard this case as deciding that the Admiralty are entitled to salvage in respect of the work done by the ship, and in this and subsequent cases such as *The Lustre* (2) and *The Ewell Grove* (3) the claim is based on the title of the Admiralty to claim salvage. In *The Ewell Grove* Sir John Nicholl, after citing the facts, said (4): "I have, therefore, no doubt as to the title of H.M. steam vessels, in cases of civil salvage, to remuneration."

There are many cases to the same effect, and it was admitted that down to the Act of 1853 the Admiralty frequently claimed, and were awarded, salvage in respect of such expenses as are referred to in H.M.S. *Thetis* (5); but they never put forward any

(1) 3 Hag. Adm. 61.
(2) 3 Hag. Adm. 154.
(3) 3 Hag. Adm. 209.
(4) 3 Hag. Adm. 225.
(5) 3 Hag. Adm. 14.

claim beyond repayment of their actual expenses, and never claimed salvage in respect of the benefits conferred on the salved vessel by the work the vessel did apart from the claim for expenses.

I think it quite unnecessary to go further into the cases that were cited on behalf of the appellants as to the right of the Admiralty to claim salvage before the Merchant Shipping Act of 1853, repeated in the Act of 1854, and now contained in the consolidating statute. As s. 557 of the Act of 1894 merely reproduces the provisions of the Acts of 1853 and 1854, I need not cite any of the statutory provisions other than s. 557. That section provides: [His Lordship read the section and continued:] It will be observed that this section does not deprive the Admiralty of the legal right which it has to say that its ships shall not be used for salvage services. As pointed out in Kennedy L.J.'s book on Civil Salvage (3rd ed.), p. 28: "voluntariness on the part of the salvor is . . . . an essential element in the constitution of a salvage service. The salvage of property has been described as the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea, under the responsibility of making restitution, and with a lien for their reward. 'What is a salvor?' said Lord Stowell in *The Neptune*. (1) 'A person who, without any particular relation to a ship in distress, proffers useful service and gives it as a volunteer adventurer without any pre-existing covenant that connected him with the duty of employing himself in the preservation of that ship.' It is to be observed that, except in the peculiar case of the passenger on board a vessel in distress, the requirement of voluntariness in the salvor is satisfied by the absence of any contractual or official obligation. There is a universal moral obligation, where life or property is in peril at sea, to render every possible assistance in its preservation. 'It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it.'" The last words are a quotation from Lord Stowell's judgment in *The Waterloo*. (2)

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(1) (1824) 1 Hag. Adm. 227, 236.

(2) 2 Dods. Adm. 433, 437.

It is clear from this that neither a private vessel nor a King's ship is under any obligation to perform salvage services. The owners of a King's ship may say without any breach of legal duty: " We are not prepared to undertake salvage services to your vessel. We are afraid you must wait until some other vessel comes along in readiness to proffer voluntary salvage service, but if you will enter into an agreement with us to pay us for the salvage services you require us to render we will render those services." The question for determination here is whether such a contract is made invalid and unenforceable by reason of the express provisions of the Merchant Shipping Acts. In my judgment, the provisions of those Acts do not have that effect. If it had been so intended, I should have expected the section to read : " Where salvage services are rendered by any ship . . . . whether under contract or otherwise, no claim shall be allowed. . . . ."

In my judgment, when the owners of the *Valverda* were asked to sign the contract which they signed in this case, they were entitled either to sign or to refuse to sign, and if they had refused to sign and the ship had still performed the salvage services, the owners of the King's ship would have been prohibited by the section in the Merchant Shipping Act from recovering anything for any loss, damage, or risk caused to the salving ship such as stores, tackle, or furniture, or for the use of any stores, or other articles belonging to His Majesty. But inasmuch as the Admiralty were under no obligation to perform any salvage services whatsoever, they could sell their freedom from such obligation at whatever price they considered right, provided that they could induce the free agent of the ship which wanted to be salved to agree to the remuneration that they asked. The Admiralty could legally have said: " Our ships are required for other services, and we will not take them away from usual and recognized duties for difficult salvage services unless you agree to pay us 11,000*l*." They could equally have said what they did in this case : " You cannot have the services of the King's ships unless you agree to pay the reasonable remuneration you would have to pay to a private salvor."

I have not thought it necessary to state in detail the facts that are so clearly stated in the award, and in the early part of Branson J.'s judgment. As appears above, I think the contract which the owners of the salved ship entered into by their agent is a binding contract between the Admiralty and the owners of the salved vessel.

Another question was raised in the Case with regard to the construction of the agreement, that is to say: Does the agreement mean that the salvors were only asking for the remuneration which they were entitled to recover in the absence of agreement under the Merchant Shipping (Salvage) Act, 1916, s. 1? In my judgment it is impossible so to read the contract. At the time the agreement was signed the services of salvage tugs were not within the contemplation of the parties, though in fact at a later period such services were rendered. Two of the ships in respect of which the claim is made, namely, *Frobisher* and *Guardian*, had been standing by and giving assistance before the date of the agreement. The *Frobisher* reached the ship on the morning of January 22, and proceeded to take her in tow. The agreement provides that the provisions of the agreement shall apply to the services rendered before the date of the agreement, January 25, as if they had been wholly rendered after the signing of the agreement. It is impossible to avoid the conclusion that the agreement has reference to the services rendered by the King's ships in making fast to the *Valverda* and starting to tow her to a place of safety. Clause 4 of the agreement provides that the remuneration shall, if the services are successful or beneficial, consist of a reasonable amount of salvage. I think that means a reasonable amount of salvage in respect of all the services rendered by Government vessels, and cannot possibly be confined to services rendered by salvage tugs or other vessels which are within the provisions of the Act of 1916. The agreement went on to provide for payment of actual out-of-pocket expenses in case the efforts of the salving ship were not successful. It seems to me impossible to suppose that the agreement was such as would give a better result to the

Admiralty in case of non-success than they would have had in case of success. The claim of the King's ship is in my judgment a claim not for salvage services, but a claim for doing these under an agreement, and there is nothing in the Merchant Shipping Act which renders such an agreement invalid in law.

Branson J. in his judgment especially relied on two cases, *The Iodine* (1) and the judgment of Bankes L.J. in *The Sarpen.* (2) With all respect to the learned judge, I do not think the decision in *The Iodine* (1) or the judgment of Bankes L.J. to which I have referred, afford any authority for the proposition that since the passing of the Merchant Shipping Acts the Admiralty are entitled to claim to be paid for salvage due under express agreement. I think *The Iodine* (1) does confirm the view I have already expressed that the Admiralty before the Merchant Shipping Act of 1853 were entitled to claim salvage, though it was usual to claim a less remuneration on account of the vessel being the property of the King. It seems to me that all that is proved by the many cases cited with regard to the rights of the King's ships before 1853 is that, though they were entitled to make salvage claims, they in fact always confined their claims to out-of-pocket expenses. The actual decision in *The Sarpen* (3) does not touch the present case. The decision was that the salving ship there was not a ship belonging to His Majesty, and that therefore her owners were entitled to recover salvage. I do not think either the decision in *The Sarpen* (3) or the judgment of Bankes L.J. afford any assistance to the decision of the present case.

Mr. Carpmael for the appellants relied on *The Matti* (4), but I think it does not bear on the question, as the towage agreement there referred to was not an agreement between the owners of the *Matti* and the Admiralty, but between the owners of the *Nunthorpe*, a private vessel, and the owners of the *Matti*.

There is, admittedly, no case in which it has been decided that since the Merchant Shipping Act, 1853, the Admiralty as owners, on behalf of the Crown, of a King's ship cannot make a legally binding contract under which, in consideration of the

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(1) 3 Notes of Cases, 140.
(2) [1916] P. 306, 319.
(3) [1916] P. 306.
(4) [1918] P. 314.

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ship's giving salvage assistance which it was not bound to give, the owners of the salved ship promise payment for the salvage services. As there is no express provision that the Admiralty shall perform salvage services, I think there is nothing in s. 557 of the Act of 1894 which makes it illegal for the Admiralty to agree that if they do that which they are not bound to do, i.e., stand by the ship and tow her to safety, they are to receive remuneration, or which renders a promise to pay for such services made by the owners of the salved ship illegal and void.

For these reasons I agree with the learned arbitrator and with Branson J. that the Admiralty are entitled to recover the remuneration provided for in the agreement which was freely signed by the agent of the salved ship, who must be taken to have known the law and the provisions of the Merchant Shipping Acts, and notwithstanding those provisions to have been willing, in case the services were rendered, to pay in the same way as he would have had to pay a private vessel undertaking the services without an agreement. I am of opinion that the arbitrator's decision and that of Branson J. should be upheld, and this appeal should be dismissed with costs.

SLESSER L.J. In this case I abstain from expressing any view as to the position regarding the efficacy of claims for salvage services rendered by any ships belonging to His Majesty apart from legislation.

In my opinion, the whole matter which falls to be considered in this case is whether the effect of s. 557 of the Merchant Shipping Act, 1894 (in effect consolidating the early sections of the Acts of 1853 and 1854), has taken away from the Crown rights which it might otherwise possess, and, if it has so deprived the Crown of power to claim for salvage services, to what extent that restriction of rights has been carried; to which must be added the problem whether, notwithstanding the restrictive legislation, a special agreement can be made to pay the Crown as salvor and whether the rights of defendants to seek protection in the statutes from claims can be made the subject of waiver.

The whole legislation which has to be considered for this purpose is now contained in s. 557 of the Merchant Shipping Act, 1894, sub-ss. 1 and 3, together with s. 1 of the Merchant Shipping Act, 1916. The language of the relevant section of the 1894 Act is as follows: [His Lordship read the sections and continued :]

In the present case, in so far as services were rendered by ships which fall within the 1916 Act, as specially equipped with salvage plant or a tug, the appellants admit that under the agreement dated January 25, 1935, between themselves and the Admiralty, the remuneration may be fixed by arbitration and they do not dispute their liability. This covers the two ships the *Creole* and the *Sandboy*, but with regard to the claim for salvage remuneration in respect of the *Frobisher*, the *Guardian* and the *Orangeleaf*, vessels not within the 1916 Act, they say that the provisions of s. 557 of the 1894 Act that "no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty supplied in order to effect those services," preclude the Court from entertaining any such claim; and that, notwithstanding a special agreement, if any, to pay therefor.

It was argued by Mr. Carpmael that in so far as these matters are not claimable, the salvage agreement which has been cited by my Lord of January 25, 1935, must be read as applying only to services claimable by statute, that is, the services of commander or crew under sub-s. 1 of s. 557 of the 1894 Act, or under the 1916 Act, and that the parties must be taken to have contracted with a knowledge of the existing law. In my view, this contention fails; either there is power in the parties by special agreement to produce a legal relation notwithstanding the statute which may deal with all services rendered, or there is no such power. In the latter case, the agreement cannot operate upon the excluded matters. In the former view, if the parties can contract without limitation, there is nothing in the language of the contract to show that any discrimination is made between salvage ships and tugs and the services of officers and men for salvage generally and the other matters dealt with in s. 557. Their agreement as such is entirely general in its terms and provides for remuneration for any services rendered.

I have, however, come to the conclusion that Mr. Carpmael is right when he says that this Court has no jurisdiction to entertain a claim for services which have been mentioned as excluded by the section. The language appears to me to be express in its terms, and I think that he is right when he contends that the learned judge was in error in applying the principles of what is generally known as " contracting out " to this case. It is true, as the learned judge observes, that there are cases where provisions in a statute for the benefit of a particular person or class of persons may be waived by them. "Quilibet renuntiare potest juri pro se introducto." But though equity may interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, so as to get rid of a waiver created by his own acts, conditions imposed by statutes which authorize legal proceedings to be taken, which are essential to give jurisdiction, cannot be waived, nor provisions which, in terms, exclude the right to claim. Conditions precedent to jurisdiction cannot be waived: per Pollock B. in *Westmore* v. *Paine*. (1) See for example of the former class *Wilson* v. *McIntosh* (2), per Davey L.J., a case of a waiver of an obligation to file a case within a certain time, a decision of the Privy Council; so also, in dealing with a case under the Public Health Act, 1875, where it was alleged that the limit of time for bringing an action had expired, the whole Court of Appeal seem to have been of opinion that the waiver of such a right was possible, though on the facts there was no waiver in that case: *Midland Ry. Co.* v. *Withington Local Board*. (3) The matter is very clearly stated in *Park Gate Iron Co.* v. *Coates* (4), where notice of appeal and security was required by statute, where in the language of Bovill C.J. such notice " seems to me . . . . to have been intended for the benefit of the respondent. It is not a matter with which the public are concerned. If this be so, it falls within the rule that either party may waive provisions which are for his own benefit."

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(1) [1891] 1 Q. B. 482, 484.

(2) [1894] A. C. 129, 134.

(3) 52 L. J. (Q. B.) 689.

(4) (1870) L. R. 5 C. P. 634, 637.

The case of *Griffiths* v. *Earl of Dudley* (1), cited by the learned judge, is another example of the same principle, and the critical question in this case to be answered is whether the provision in s. 557 can be waived in the interest of a limited class (as in the present case by inducing the Admiralty to perform services which otherwise they might not perform or were, at most, under an imperfect obligation to perform by promising to pay them for such services) or whether this section, rightly regarded, is not one of general public provision extending beyond a particular class. Conditions enabling or disabling for the general purpose of the public cannot be waived: *Reg.* v. *Bertrand* (2); *Barrow's* case. (3) The distinction appears to me to be a valid one to be drawn between statutes dealing with procedural or private rights or limitations which may be renounced and specific public enactment denying jurisdiction to hear the action.

In the present case, I see no reason to assume that s. 557 is merely inserted for the protection of the class of persons who may receive salvage services from His Majesty's ships. There having arisen in the many cases which have been cited considerable doubt as to the extent of the Crown's right in these matters, I think that the Act of 1853 was concerned unambiguously to declare the law so that all parties, the Admiralty, their officers and men, the owners of ships and the public at large might know the extent of the liability. The very nature of the duties of His Majesty's ships primarily to defend his sovereignty indicates the public nature of acts which arise from deviations from that duty involved in salvage operations and the like. Moreover, the language of s. 485 of the Act of 1854, now substantially embodied in the latter part of sub-s. 1 of s. 557 of the Act of 1894, a subject-matter dealt with in part in 12 Anne, Stat. 2, c. 18 (Ruffhead), which, now, in its final form, limits the rights of officers and men of His Majesty's ships to claim salvage without the consent of the Admiralty, points

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(1) 9 Q. B. D. 357.

(2) (1867) L. R. 1 P. C. 520.

(3) (1880) 14 Ch. D. 432.

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to the public nature of the legislation. It is pro publico introducto.

The discussion before us on public policy does not seem to carry the matter any further, for, if the statute be of general application, public policy clearly requires the observance of its provisions; "privatorum conventio juri publico non derogat." If it were not for the public purposes, it is difficult to see what policy is served by preventing the Admiralty from claiming remuneration for services which might otherwise, conceivably, not be rendered.

Being of opinion, as I have stated, that the prohibition of the right to claim for the services is general in its nature and not enacted solely for the benefit of those persons who are to receive the services, I come to the conclusion that the legislation is of the kind which cannot be waived and that this Court has no jurisdiction to entertain a claim for the services by the section excluded. As Scott L.J. has arrived at the same conclusion, it follows that, in the opinion of the majority of the Court, this appeal succeeds.

Scott L.J. This is an appeal by the owners of a salved ship, cargo and freight against a decision of Branson J. upon a case stated by an arbitrator. It raises questions as to the meaning of s. 557 of the Merchant Shipping Act, 1894; as to the true interpretation, in the light of that section, of a certain salvage agreement between the Admiralty and the owners of ship, cargo and freight in a position of present peril; and, if that agreement be interpreted in one way, whether certain claims made by the Admiralty in their own interest, i.e. on behalf of the Crown, and assessed by the learned arbitrator at 4500*l.*, are, notwithstanding the statute, legally enforceable under the agreement so construed. These three questions of law may be put shortly: (1.) What does the agreement mean? (2.) What does s. 557 mean? and (3.) Is the apparent scope of the agreement indirectly cut down through the statute making it wholly or partly unenforceable?

It will be convenient, however, before discussing question (1.) to begin by quoting in full the only two statutory provisions which have to be considered in the course of this judgment. Sect. 557 is as follows: [His Lordship read the section and continued :] The history of the section is this: The first part of sub-s. 1, prohibiting certain claims, was originally introduced as s. 39 of the Merchant Shipping Law Amendment Act, 1853 (which is printed in the King's Printer's copy of the Statutes after s. 40). The wording was practically the same as that of the first half of s. 557, sub-s. 1, to-day. In the consolidating Merchant Shipping Act of 1854, s. 39 of the 1853 Act became s. 484. In the 1853 Act there was nothing equivalent to the second part of sub-s. 1 and sub-ss. 2 and 3 of s. 557 of the Act of 1894, but an enactment on the subject of the consent of the Admiralty to proceedings by the commander or crew of H.M.'s ships on lines similar to those in s. 557 of the 1894 Act, was included in the 1854 Act, as s. 485. In 1894 the substance of s. 485 was re-enacted in the second half of sub-s. 1 of s. 557, although the details as to procedure and proof of consent contained in sub-ss. 2 and 3 of s. 557 are somewhat different to s. 485 of the 1854 Act. So far as the present appeal is concerned the net result is that the relevant part of s. 557 originally became law in an amendment Act in the year 1853.

That part of s. 557 was amended by s. 1 of the Merchant Shipping (Salvage) Act, 1916. Sect. 1 is as follows: [His Lordship read the section and continued :]

The facts have already been sufficiently summarized by Greer L.J.; they are clearly and fully stated in the award.

For the purpose of construing the agreement (and particularly in view of certain passages in the learned judge's judgment) it is desirable to set out a good deal of it in extenso. At the moment of its execution the salvage services had already been started, but nothing turns on that fact, and the clause of the agreement relating to it need not concern us. The agreement was made between an agent for owners of the ship (thereinafter called "the master or owner") cargo and freight of the one part and the Admiralty of the other. The relevant parts are the following: [His Lordship read the agreement.]

Before the arbitrator no dispute arose as to H.M.S. *Sandboy* and H.M. yardcraft *Creole*, which fell for all purposes within the 1916 exception to s. 557 of the Merchant Shipping Act, 1894.

Para. 10 of the award says: "The Admiralty contended that by virtue of the terms of the salvage agreement hereinbefore referred to they were entitled to claim in respect of the services of all five ships. They further contended that apart from the said agreement they would, in the circumstances above set out, have been entitled so to claim."

By para. 12 the learned arbitrator upheld the above contention and awarded 11,000*l.* as a lump sum payable under the terms of the agreement, the question of distribution as between the Crown as owners of H.M.'s ships and the captains and crews not having been referred to him. The question left to the Court in para. 13 was: Whether upon the facts hereinbefore set out the Admiralty are entitled in law to salvage remuneration in respect of the services of H.M.S. *Frobisher*, H.M.S. *Guardian* and R.F.A. *Orangeleaf*, and by para. 15 he fixed at 6500*l.* the figure to which the award should be reduced if para. 13 should be answered by the Court in the negative, 4500*l.* thus being the sum at which he assessed the services of the three ships not within the 1916 Act.

Question (I.). What does the agreement mean? Does its language cover the claims to which para. 13 of the award relates? Assuming that the agreement was one into which it was open for the parties to enter, the learned judge has held that the arbitrator's interpretation was right if the agreement is to be construed as "an agreement between two parties sui juris and according to the meaning of the language used without reference to anything else." By this hypothesis he intended to eliminate any disability resting by law, either unwritten or statutory, upon the Admiralty, and possibly also upon owners desiring to contract with the Admiralty. On that hypothesis I should concur in his interpretation. But to make the hypothesis at all was, I think, a mistake; it could not help in the solution of the first question of the case—namely, What is the meaning of the agreement in the light of that legal disability? Does not the statutory inhibition necessitate an interpretation which will restrict the wide meaning of clauses 1 and 3 to such claims for salvage remuneration as the law, written and unwritten, allows either the Admiralty or the personnel of H.M.'s vessels to make for the use of H.M.'s ships? On this question of construction it is to be observed that the agreement was on the printed "Admiralty Standard form of Salvage Agreement" which was established in 1917—just after the Act of 1916 came into force. To ships coming within that Act it would be wholly applicable: but when used for H.M.'s ships not of the kind within that Act, difficult questions of interpretation are left open. The agreement does not in express terms say that it is intended to confer on the Admiralty the right to claim, and to impose upon "the master or owner" the correlative obligation to pay remuneration of the kind forbidden by the statute. Nor does the mere fact that the Admiralty are contracting parties throw any light on the problem of construction, for the agreement covers various services for which the Admiralty could claim on their own behalf; and for the rest the Admiralty were plainly acting in the matter as agents for the commanders and crews of H.M.'s vessels in respect of personal services to be rendered by the latter. What is there then in the language of the agreement to justify our interpreting it as intended to enlarge the Admiralty's rights, either in their own behalf, or on behalf of officers and men, beyond the limits allowed by law, so as to give them a remuneration to which without an agreement they would have no right?

Whatever the unwritten law was before 1853, the main provision of s. 557 has been on the statute book since that year, and is by far the most important of all "surrounding circumstances" which can throw light on the interpretation of the agreement. If it was the intention of the parties to exclude the operation of the statute they could easily have said so. I see no such express words as seem to me necessary to do that. It seems to me to follow that if it is possible to construe the agreement as limited to "allowed" claims that construction must be right. I agree with the learned judge and the learned arbitrator that apart from the legal inhibition the wider meaning of the agreement would be the more

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natural; but on the whole, although not without doubt, I think that the agreement can and therefore should be construed in the narrower sense of an undertaking to pay such salvage remuneration as is not barred by the conjoint operation of the two Acts of 1894 and 1916, and no more. It follows that on this first ground I answer the arbitrator's question in the negative.

But if my interpretation is wrong and Branson J.'s is right, and for that reason the agreement does expressly cover the banned heads of salvage remuneration, my further questions Nos. (2.) and (3.) arise (namely, as to the meaning of s. 557 and as to its effect upon the agreement), and the answers to them may lead to the same practical result as my answer to question No. (1.).

Question (2.). The meaning of s. 557. I do not think that there can be any real dispute about the meaning of the section; the words " no claim . . . . shall be allowed for (x), (y), (z)", are too plain. It is indeed conceded on behalf of the Admiralty that the whole of the 4500*l.* of remuneration described in para. 13 of the award falls strictly within the category of claims for remuneration which the section says " shall not be allowed," and that in a salvage action in the Admiralty Division, had there been no agreement, the Admiralty suing as plaintiffs would have failed to get judgment for the 4500*l.* or any part of it. That being so, I think the legal conclusion follows, that the section must be interpreted as meaning that the banned claims are not to be allowed in the King's Courts: and if they are not allowed there, it also follows that no such cause of action can exist.

Question (3.). What is the effect of s. 557 upon the agreement, if my answer to question (1.) is wrong? Is an agreement made for the express purpose of creating by contract a cause of action for salvage remuneration falling within the statutory ban enforceable in the Courts, notwithstanding the statute?

This issue was described by counsel as a question whether the parties could contract out of the statute. However it is stated, it turns upon the effect to be given to the words " no claim shall be allowed" as applied to the elements of reward described in the section. Some point was made on behalf of the Admiralty before Branson J. and before us in relation to this issue that the agreement should be regarded as "a common law agreement" and not as "a salvage agreement." I am not quite sure what difference in legal consequences it is contended would follow if it were the one rather than the other; but anyhow I do not think that the agreement is a "common law agreement": it is expressed throughout in language which preserves the characteristics of Admiralty salvage. This appears particularly in cl. 7 in relation to the maritime lien for salvage; no maritime lien can be conferred by contract, and the clause must accordingly be read as referring to the lien resulting in accordance with the law of the Admiralty Court, from salvage services recognized by that Court as true salvage services, that lien must be the lien which the salvors have acquired by operation of law outside the agreement. For that reason the word "have" in the sentence "Pending the completion of the security as aforesaid the Admiralty shall have a maritime lien" must be read as meaning "retain"—until the security is completed. For the same reason cl. 7 has no application to cl. 5, for the true maritime lien attaches only to property salved. It is just an ordinary salvage agreement such as has always been treated in the Admiralty Court as leaving untouched the inherent legal characteristics of true salvage. In that Court salvage is none the less salvage that there has been some agreement about it: see Edwards on Admiralty Jurisdiction (1847), p. 189. "Such an agreement is no bar to the jurisdiction of the Admiralty Court": "such agreements are frequently pronounced for, and not allowed to be set aside unless under strong and sufficient reasons"; for the Admiralty Court has always a power of its own to reopen such agreements: see Kennedy on Civil Salvage (3rd ed.), p. 249. I am not forgetting that although the right to remuneration for a maritime salvage probably had its origin in the jurisdiction of the Admiralty—see Kennedy (3rd ed.), pp. 3 and 4—it was also recognized by English Courts of common law. But the common law right differed in two respects—the proceeding was in personam and a common law possessory lien took the place of the maritime lien: see p. 407 of Abbott on Shipping, 4th ed. 1812, the last edited by Lord Tenterden himself: repeated in the 5th ed. (1827) at p. 398. I cannot, however, see that it makes any difference to any question in the present appeal whether it is an Admiralty agreement or a common law agreement which we are asked to construe and enforce.

If I am right in the view I have expressed that s. 557 abolishes the cause of action for any of the banned heads of remuneration it is a long step towards two further conclusions—namely, (i.) that the King's Courts are deprived of jurisdiction to consider those claims, and (ii.) that a rule of public policy is thereby laid down. That the words "no claim for . . . . shall be allowed" express a direction to the Courts, before which such claims might have come had no such statutory prohibition been passed, not to allow any claim of the prohibited kind, I cannot doubt. In so far as the Courts are so directed, their jurisdiction is affected; and if a Court's jurisdiction is taken away it is the duty of the Court of its own motion to refuse to entertain an excluded claim. This seems to me the one plain part of the natural meaning conveyed by the express words used. A further direction is in my view given to the Admiralty itself and to the personnel of the Navy. But if no claim is to be allowed by either the Lords of the Admiralty or the personnel of the Navy performing salvage services for salvage remuneration for "loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to [His] Majesty, supplied in order to effect those services, or for any other expense or loss sustained by [His] Majesty by reason of that service," how are we to escape the conclusion that an agreement which provides for the doing of the very thing which the Act says is not to be allowed is an agreement to do an unlawful thing?

An argument was addressed to us (and also to Branson J., who accepted it) urging that there is similarity between the words "no claim for . . . . shall be allowed," and words of some other statutes where the view has been taken judicially, or at least followed by practitioners and not rejected judicially, that the particular words therein enacted were inserted for the benefit of the party concerned, and are therefore to be construed as granting him a privilege, which he may waive on the principle "Quilibet renuntiare potest juri pro se introducto."

To this argument I reply, that we have to construe the words of this particular section, and that we have not had any statute cited to us by counsel for the Admiralty which contains precisely the same, or even very similar words, still less a statute so worded which has also been judicially construed in accordance with the argument. The statute upon which most reliance was placed by Branson J. was the Public Authorities Protection Act, 1893. But there are two distinctions, (1.) The words are not the same—nor are they similar: they are "Where . . . . any action . . . . is commenced" it "shall not lie or be instituted unless it is commenced within six months." Those words do not purport to negative the cause of action or make it unlawful to make the claim: they assume the existence of a lawful claim and merely impose a procedural limitation of time for the institution of legal proceedings to enforce it, in order that public authorities may be protected from stale claims. It is thus in essence a Statute of Limitations, as was held in *Gregory* v. *Torquay Corporation* (1), per Pickford J. I recognize that the words of that Act "the action shall not lie or be instituted" prima facie have a superficial similarity to "no claim shall be allowed" in this Act; but there is no underlying similarity. The whole purpose of that Act was not to prevent claims being put forward, but to ensure that there should be no unreasonable delay in bringing them forward; and that of itself is sufficient to justify a wholly different interpretation of the two phrases. Besides I do not feel sure that if the point had been argued in 1894 the Court would have construed the Act as leaving the cause of action still effective after the six months' period if the defendant authority did not raise the defence; it might have taken the view that it was the duty of the Court itself to raise the question. There has been such a long and unbroken

(1) [1911] 2 K. B. 556, 560, affirmed [1912] 1 K. B. 442.

practice since 1893 of regarding the Public Authorities Protection Act, 1893, as affording an optional defence, that even the House of Lords would now be slow to disturb the accepted interpretation; but for that very reason I think that the prevailing interpretation must be regarded critically, if the true meaning of the original words when the Act was first passed is to be sought. In this context it is relevant to recall what Lord Finlay said as Lord Chancellor in *Morris* v. *Baron* (1) on a similar question—the difference of wording between s. 17 and s. 4 of the Statute of Frauds; and between s. 17 of the statute and the substituted words of s. 4 of the Sale of Goods Act, 1893. Lord Finlay was not ignoring what Lord Blackburn had said in *Maddison* v. *Alderson* (2), but nevertheless was still of opinion in 1918 that the words of s. 17 did make the contract invalid; and if he was right, the history of that section in our Courts is a good illustration of how a true original meaning may become obscured in the course of time by an erroneous customary interpretation, accepted and even in the end confirmed judicially—so that it becomes, as Lord Blackburn said, "communis error and so makes the law." We are not concerned in this case to pursue the point raised by Lord Finlay any more. I only refer to it for the purpose of further discounting the value which attaches to the habit of citing other statutes in order to construe the one calling for interpretation.

The fundamental distinction of the various enactments cited as similar is that there is nothing in the enactment we have to consider to indicate that it is intended for the benefit of anybody. To whom could the maxim I have quoted have been held to apply? Who were the benefited persons who could renounce their benefit? Consider the contrast afforded by the Public Authorities Protection Act, 1893. Parliament made it clear there that the Act was for the benefit of a particular class—both the short title and long title call it an "Act for the protection of Public Authorities." Parliament thus emphasized their protection as the dominant purpose of the Act, and created for public authorities a privileged position of which the beneficiaries could avail themselves or not as they liked—a position to which the maxim is directly applicable.

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(1) [1918] A. C. 1, 11.

(2) 8 App. Cas. 467, 488.

The respondents relied also on the analogy of the old 17th section of the Statute of Frauds. I have already indicated one reason for rejecting that analogy—the doubt expressed by Lord Finlay as to the original meaning of the words of s. 17. Another difference is that the Act was dealing not with claims but with the form and proof of the contract, the purpose being to protect a particular class of person, namely purchasers, from frauds.

Reliance was also placed upon *Griffiths* v. *Earl of Dudley* (1), a case upon s. 1 of the Employers' Liability Act, 1880, where it was held by a Divisional Court that the statutory exclusion of the common law doctrine of common employment from employers and workmen contracts did not prevent the parties contracting out of the Act. It was not an enactment to forbid claims—it was an enactment to confer a benefit on a particular class, by taking away a particular defence against claims. The decision is not in pari materia with a statute which on the one hand says claims are not to be allowed, and on the other does not purport to confer a benefit on any particular class.

In the result I agree with Slesser L.J.'s views; I do not think any one of the statutes, on the similarity of which the respondents rely, is really analogous; the cases cited therefore cannot help, and we have to make up our minds on the effect of the words used in this statute. On that question it is my opinion that the words of s. 39 of the Act of 1853, repeated in s. 484 of the consolidated Act of 1854, and s. 557 of the similar Act of 1894 are capable of only one interpretation: I think they constitute an express prohibition of all salvage claims falling within their ambit, and I feel bound so to hold, although in view of Greer L.J.'s judgment I do so with diffidence.

However, even if the words are not quite so clear as I think them, and leave any ambiguity, there are certain considerations which seem to me to support an identical interpretation.

(1) 9 Q. B. D. 357.

If a statute dealing with a general question of law contains any ambiguity, it is essential to see what the state of the law was when it was passed. Let us apply that rule to the Act of 1853. Salvage remuneration appears originally to have been given by the Court of Admiralty in this country as a reward to individual salvors, officers and crew and others, for personal services, successfully rendered by them at their personal risk, to maritime property, i.e. ship, cargo or freight, in danger either from enemies (including pirates) or perils of the sea; the former being known as a military salvage and the latter as a civil salvage. This is the primary sense of salvage: see H.M.S. *Thetis* (1), per Sir Christopher Robinson. "Salvage, in its simple character, is the service which those who recover property from loss or danger at sea, render to the owners, with the responsibility of making restitution, and with a lien for their reward. It is personal in its primary character, at least; and those who are so employed in the service are those whom the law considers as standing in the first degree of relation to the property and to the proprietors."

It was only at a later stage, some time after our Courts had first admitted the general right of personal salvors, that the risk incurred by the owners of a salvor ship used as an instrument in the salvage service, came to be recognized as a separate ground for remuneration entitling its owners to claim. It was as an exception to the general rule that the owner's claim was admitted: see per Lord Stowell in *The Vine*. (2) "The claim of Lieut. Porter is quite novel. It is, I apprehend, a general rule that a party, not actually occupied in effecting a salvage service, is not entitled to share in a salvage remuneration. The exception to this rule that not unfrequently occurs is in favour of owners of vessels, which, in rendering assistance, have either been diverted from their proper employment, or have experienced a special mischief, occasioning to the owners some inconvenience and loss, for which an equitable compensation may reasonably be claimed."

It is not necessary for the purpose of this judgment to ascertain when this extension was first allowed by the Court, but the invention of steam made the steam vessel so efficient an instrument of salvage that its use soon caused the Court to give emphatic recognition to the owner's rights as salvors: see a case in 1824, *The Raikes* (1), where Lord Stowell referred to them: " This is a case of salvage service performed by the *Monarch* steam-packet; and it is the first cause in which a compensation has been claimed, in this Court, for the services of a vessel of this peculiar character: I am, therefore, inclined to give as much encouragement as possible to similar exertions, on account of the great skill, and the great power of vessels of this description." In 1857 Dr. Lushington in *The Spirit of the Age* (2) said: " We all know that formerly claims of owners of vessels to participate in salvages did not receive very favourable attention from the judges who preceded me in this chair; but since then things are much changed; steamers are able to render important salvage services, in which the ship herself is the chief agent. I have therefore departed from the former practice, and have given adequate rewards to the owners of such vessels."

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(1) 3 Hag. Adm. 14, 48.

(2) (1825) 2 Hag. Adm. 1.

It is unnecessary to refer in further detail to the cases upon the grounds for remunerating the owners of salvor vessels; the history of the law is sufficiently stated in Kennedy on Salvage (3rd ed.), Ch. IV., and particularly pp. 81–5. But this enlargement of the scope of salvage remuneration does not seem, as far as I have been able to trace, ever to have been judicially extended to the King's ships—at least to the extent of allowing the Admiralty or the Crown to claim as salvors in ordinary cases of salvage by the King's ships. The first approach to such an extension which I have been able to find was in 1833, in H.M.S. *Thetis* (3), to which I have already referred. That was a wholly exceptional salvage. H.M.S. *Thetis*, a frigate of 46 guns, had sunk in a rocky cove on the Brazilian coast with a treasure of 810,000 dollars on board. Extraordinary salvage services, mostly from the land, and lasting over eighteen months, were rendered by the Admiral in charge of

(1) (1824) 1 Hag. Adm. 246.
(2) Swabey Adm. 286.
(3) 3 Hag. Adm. 14.

the station and by a Captain Dickinson and others nominated by him for the work; in addition plant and apparatus of what was then a novel and ingenious kind were specially made, funds being found by the Admiralty for the purpose. In the end 750,000 dollars were recovered. Sir Christopher Robinson made various awards to the salvors for personal services. There was in addition a claim by the Admiralty of 13,833*l.* for the expenses to which they had been put, but there was no adjudication upon the legal justification of this claim, as the owners of the treasure and the Admiral as salvor both assented to its being met out of the salved dollars; so that to that extent there was no dispute about the Admiralty's right. In addition it must be remembered that the nature of the service was very unusual. Sir Christopher Robinson said of it (1): "The claim on the part of the Admiralty for the wages and victualling of the men, and for the wear and tear of the ships, has been in some degree resisted on the part of the salvors; and it is said to be unprecedented; but I do not know that it can be essentially distinguished from claims of owners for demurrage and repairs, in cases of private salvors; and such claims have constantly been allowed. The claim is more novel in form than in principle, and new classes of cases may be expected to require new rules. The Lords of the Admiralty are but trustees for the public, in regulating the employment of H.M.'s ships; and they must act as they think proper in regard to the terms on which they may be permitted to engage in such services as these. There is, undoubtedly, a difference between the assistance afforded in ordinary cases, by public vessels, for which nothing has hitherto been charged, and the appropriation of them with additional supplies of men and stores, to a service of this kind, for eighteen months together. I am, however, not called upon to give any opinion on this claim, as it is not opposed, but admitted, on the part of the owners and of the Admiral; and I think the salvors have no reason to complain of being so supplied with the means of effecting this service." The observation of the learned judge will be noted that such a claim had not hitherto been allowed "in ordinary cases."

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(1) 3 Hag. Adm. 61–2.

Again in *The Ewell Grove* (1) a vessel, stranded hard on a rocky shelf off Jamaica in a position of great danger, was rescued by H.M.S. *Rhadamanthus*, a steam vessel. Sir John Nicholl (2) pointed out the similarity of circumstance in the use of a King's ship to the ordinary case of a private owner. But the salvors claiming were not the Admiralty but the captain and crew of the King's ship, and Sir John Nicholl only referred to a possibility of the Admiralty asking the salvors for part of their award.

The fact that in ordinary cases an exception had been made in favour of private owners but that this privilege had not been definitely extended to the Crown for the use of King's ships is the more significant, in that it would seem just as logical to extend the benefits of the law of salvage remuneration so as to give the Crown some reward for the risks run by its property, as it had been to extend it so as to give the owners of private salvor ships a reward for the risks run by their property. So much are the two on a parity that I cannot help thinking that the real reason why the right of the Crown was not frankly recognized must have been some view taken of public policy—possibly that it was a wrong principle to allow the Crown to claim, because the Crown was already under a moral duty to all its subjects to assist them in distress at sea, and therefore ought not to seek a reward when using public ships to discharge a public duty. But it is not for the Court now to speculate as to what the reason was; it is enough to record the fact that in 1853 when the relevant statute was passed, the state of the law appears to have been that the question of remuneration to the Admiralty for the use of King's ships and other matters mentioned in the statute had not been the subject of direct judicial decision, although it had been indirectly considered from time to time.

In the argument before us it was contended that in some of the cases in the first half of the 19th century the Court intended to express an opinion which, although obiter, was entitled to

(1) 3 Hag. Adm. 209.

(2) Ibid. 224–5.

respect, to the effect that a claim by the ship itself, i.e. by the Crown or Admiralty, was cognizable, and that reward might in that capacity be given to the owners of the King's ship. I do not think this was ever intended by our Admiralty judges. A good illustration of the misconception is afforded by the passage in the judgment of Dr. Lushington in the year 1844 in the case of *The Iodine* (1), which was actually cited by Bankes L.J. in *The Sarpen.* (2) The passage to which I refer is: " that where a service is done, and there is personal risk and labour, Her Majesty's officers and seamen are entitled to be rewarded precisely in a similar manner, on the same principles, and in the same degree, as where any other persons render that service. But, with regard to the use of the vessel, a different consideration would apply, and a less remuneration would always be made, on account of the vessel being the property of the country, and the property of owners under these circumstances never being risked." The second sentence was quoted to us (and apparently also to the Court in *The Sarpen* (3)), as intended to refer to claims on behalf of the Crown, or the Admiralty, in respect of the services rendered by a King's ship. I do not think this is the correct interpretation of the sentence; in my view it meant simply that in a suit for salvage remuneration on behalf of officers and seamen of one of H.M.'s ships, although so far as concerned their claims for their personal services the claimants were on the same advantageous footing as persons not in H.M.'s service, yet their remuneration must be limited to the value of their personal services without any reference to the risks caused to H.M.'s ships and other property in the course of the salvage services, just because the claimants did not own them—with the consequential corollary that the total remuneration to be paid out of the salved property would always for that reason be less than if the salvors had been private owners: see Kennedy on Salvage (3rd ed.), pp. 124–5.

In examining to-day the language used by the earlier Admiralty judges it is important to keep in mind the inveterate habit of personifying the ship, as being itself the plaintiff or defendant in Admiralty suits including salvage cases. Time after time Admiralty judges are reported as speaking of the ship as making the claim, in cases where the salvage had been effected by a King's or Queen's ship; but the only claimants before the Court were the officers and crew. It never seems to have entered any one's head in those days that the Crown or the Lords Commissioners of the Admiralty were being referred to, or that they were or could be plaintiffs suing in the capacity of owners of the ship which had incurred risk or suffered damage in effecting the successful salvage. Illustrations of this source of ambiguity are to be found in two or three cases cited to us by counsel, and particularly in *The Iodine* (1), cited by Bankes L.J. in *The Sarpen* (2), to which I have already referred: see for instance *The Louisa* (3), where Lord Stowell, then Sir William Scott, said in regard to the salvage of a re-captured ship which was in a sinking condition: "The ship must be taken to have been in a state of considerable danger from her own condition; and though it is certainly the duty of King's ships to afford assistance to all His Majesty's subjects whom they may meet with in distress, yet I do not know that it is incumbent upon them, at the hazard perhaps of their lives, and without any prospect of reward, to take charge of a ship in a sinking state. Any hesitation in affording assistance might be of dangerous consequence to the property of persons so circumstanced; and it is therefore proper, for the encouragement of prompt and signal exertions on the part of the King's officers and men, to hold out to them the prospect of reward. . . . . The Captain of a man-of-war is not bound to put himself or his men in danger to preserve a merchant ship from sinking; and I do not know that he is bound to take her in tow. He did so, in this instance, for as long a time as any assistance of that kind was required; and although the service which has been performed is not of the highest degree of merit, it is not to be too lightly estimated."

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(1) 3 Notes of Cases, 140, 141.
(2) [1916] P. 320.
(3) Ibid. 306.

(1) 3 Notes of Cases, 140, 141.
(2) [1916] P. 320.
(3) 1 Dods. Adm. 317, 318.

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It is to be noted that the case is reported under a headnote saying "Civil salvage is due to a King's ship for services rendered to a vessel in distress" but the only claim before the Court was by officers and crew. Similar observations apply to *The Mary Ann* (1), where the commander and crew of H.M. sloop *Arab* were given salvage and Lord Stowell said: "In this case a demand is made for the remuneration of salvage services, which have been meritoriously effected by the commander and crew of H.M. sloop *Arab:* and, undoubtedly, the parties may fairly claim a remuneration, although the ship belongs to the state, and although there is an obligation upon King's ships to assist the merchant vessels of this country; yet, when services have been rendered, those who confer them are entitled to an adequate reward."

The examination of the old cases seems to show that it was common form in the Admiralty Court that it was only the officers and men who were entitled to claim, at any rate in respect of remuneration proper, for the services of the ship. Nor have I found any case, with the doubtful exception of H.M.S. *Thetis* (2), in which loss or damage to Government stores, or indeed any expenses incurred by the Crown were allowed as salvage. Nor have I found any case of an agreement for such payments being enforced by the Admiralty, either as salvage or at all. It is true that in the case of *The Lustre* (3) there was reference to what is there called an "express stipulation and condition that the owners and underwriters would be answerable for the payment of the stores expended or damaged"; but there again the claimants were the officers and men of the King's ship; and in addition there was no adjudication on the question of the agreement.

The position therefore when the Act of 1853 was passed may I think be summarized by saying that no practitioner in the Court imagined that a legally enforceable claim could be put forward by the Crown for salvage remuneration due to it as owner in respect of a Queen's ship used in the salvage service. What then was the object of the Act? It may have been merely declaratory. Possibly it may be a more natural inference that as there had been signs of attempts by the Admiralty to make claims—such as that in *The Lustre* (1)—and that Parliament thought it good public policy to forbid such claims in clear terms. Possibly some question may have arisen with a foreign Government through the Admiralty trying to recover salvage from a foreign ship.

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(1) 1 Hag. Adm. 158.
(2) 3 Hag. Adm. 14.
(3) 3 Hag. Adm. 154.

In the result I feel forced to the conclusion that Parliament had deliberately taken the position in hand, and then decided to clear up doubts by declaring that no such claims were to be allowed in the future. One thing at any rate is clear: it cannot be said that Parliament was by the new law conferring any particular benefit upon the owners of ships, freights and cargoes in maritime peril as a class. Taking everything into account there seems to me to be sufficient reason to resolve any doubt which there may be (and I see none) in favour of the construction of the words "no claims shall be allowed" as meaning "all such claims are forbidden."

It is curiously interesting that we have the report of a case which came before Dr. Lushington within three months of the Act of 1853 coming into force (which was October 1, see s. 3 of the Act) where he expressed his understanding of the new Act. *The Rosalie* (2) (heard on December 20, 1853) was a salvage case where the claimants were the officers and crew of a Queen's ship, and Dr. Lushington said this: "Before I advert to the particular facts and circumstances of this case, I will observe that I do certainly rejoice the ancient law and practice of this Court has not been altered. Whatever may be the merits or demerits in this particular instance, I think that, continuing to allow her Majesty's officers and those under their command, to obtain a reward where they do render beneficial services, frequently at great risk and peril, and sometimes where the commander incurs great responsibility, is not merely an act of justice, but most advantageous to the mercantile marine of this country. . . . The parties promoting this suit are Lieut. Day and those on board the *Locust*. Of course he could make no claim for the service of the steamer

(1) 3 Hag. Adm. 154.

(2) 1 Spinks Ecc. & Ad. 188, 189.

himself—she is the property of the Government; and though he would be responsible for any damage which improperly occurred, he would be answerable for nothing else. It is impossible for him to advance any demand at all like that of the owners of steam or other vessels who have risked their property in order to render assistance to others."

It will be observed that in the first passage quoted Dr. Lushington says in terms that the ancient law and practice of the Court has not been altered (sc.) by the recent Act. In the second passage he points out that the service of the Queen's ship in itself, being the property of the Government, cannot enter into the consideration of the officer's claim for remuneration of himself, except in so far as being responsible for damage to the vessel through his own negligence he may have incurred a personal risk in that respect. This second sentence serves to reinforce the view I have expressed as to the true meaning of the passage in *The Iodine* (1) quoted by Bankes L.J. in *The Sarpen* (2); it also shows that Bankes L.J. used the word "restricting" in that passage inaccurately; and consequently that Branson J. was in error in relying upon his construction of it.

There is still one more reason for construing s. 557 as a prohibition of claims within its ambit on general grounds of public policy, and not as a grant of optional defence to defendants. It seems to me that the Act of 1916 read in its natural sense assumed that s. 557 prohibited claims by the Admiralty, and that it is because Parliament took that view of the law, that it decided, perhaps in the interest of British merchant shipping during the War, to rescind the prohibitions to a partial extent—namely, for H.M.'s specially equipped salvage vessels and tugs. The judgment of Sir Samuel Evans P. in *The Matti* (3) seems to support that view.

For these various reasons I have arrived at the conclusion in answer to my question (3.) that, even if there is any ambiguity in s. 557 the crucial words in it ought to be construed as a prohibition. If so the Admiralty could not make a contract to defeat the Act, and whether my view upon question (I.) is right or wrong I agree in the conclusion reached by Slesser L.J. that the appeal should be allowed.

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(1) 3 Notes of Cases, 140, 141.

(2) [1916] P. 320.

(3) [1918] P. 314, 319.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors for appellants: *William A. Crump & Son.*
Solicitor for Admiralty: *Treasury Solicitor.*

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RHOKANA CORPORATION, LIMITED *v.* INLAND REVENUE COMMISSIONERS.

Revenue — Income tax — Company — Debentures—Interest payable in sterling or at option of holder in different foreign currencies at fixed rates of exchange—Payment taken in foreign currency—Company's increased liability to tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 21. *Finance Act,* 1927 (17 & 18 *Geo.* 5, *c.* 10), *s.* 26.

In 1931 a company issued 4,500,000*l.* 7 per cent. debentures at par, and in accordance with the terms of issue condition 11 of the debentures provided: "The principal money premium (if any) and interest hereby secured shall be paid in sterling at Barclays Bank Limited . . . . or other the bankers of the company in London for the time being or at the registered office of the company or in U.S.A. dollars at the fixed rate of exchange of 4.86 dollars to the £ at the office of Messrs. J. P. Morgan and Co. . . . . New York or in Dutch florins calculated at a fixed rate of exchange of 12.11 Dutch florins to the £" at a bank in Amsterdam.

On June 30, 1931, and December 31, 1931, interest in respect of the debentures became due, and was paid out of profits not brought into charge for tax. In respect of this interest warrants were posted to the registered holders to the net amount in sterling of 87,749*l.*

The company was assessed to income tax under r. 21 of the All Schedules Rules to the Income Tax Act, 1918, in respect of the gross interest of 116,998*l.* and income tax thereon was duly paid.

Each warrant had a footnote repeating in effect condition 11 of the debentures. Owing to the depreciation of the pound which took place in September, 1931, when England went off the gold standard, many debenture-holders encashed their December interest warrants in New York and a few in Amsterdam.

An additional assessment was made on the company in respect of warrants cashed in New York or Amsterdam because when the payments of dollars or florins were converted into sterling at the current rate of exchange the sterling value was considerably in excess of the sum in sterling appearing on the warrants:—

Held (reversing Lawrence J.'s decision), that the additional assessment must be confirmed. Payment of interest was only made by payment at the place and in the currency selected by the holder in exercise of his option, and the deduction of tax under r. 21 of the All Schedules Rules to the Income Tax Act, 1918, was made at the time of payment by paying a net sum only after deduction of tax. Rule 21 applied to payment outside the United Kingdom in a foreign currency, and such a payment was a payment of interest within r. 21, although it was necessary for the purpose of bringing the same into computation for the United Kingdom income tax to turn it into sterling.

APPEAL from a decision of Lawrence J. on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on April 16, 1934, Rhokana Corporation, Ld. (hereinafter called "the company"), appealed against an additional assessment in the sum of 41,732*l.* 10*s.* for the year ending April 5, 1932.

The assessment was made under r. 21 of the All Schedules Rules to the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, and was in respect of certain interest alleged to have been paid by the company out of profits or gains not brought into charge to income tax.

The company was incorporated in 1923 under the Companies Acts, 1908–1917, with an authorized capital of 2,000,000*l.* divided into "A" shares and ordinary shares of 1*l.* each. The registered office of the company was in London.

In April, 1931, the company offered to its members and issued at par 4,500,000*l.* 7 per cent. 20 years convertible debentures. The debentures were secured by a trust deed constituting them a first floating charge over all the assets and undertakings of the company present and future. It was a term of the offer that the payment of interest (less United Kingdom income tax), principal and premium would be made at the option of the holder :—

(*a*) at the office of Barclays Bank Ld., 54 Lombard Street, London, of the net sum payable in sterling ; or

(*b*) at the office of Messrs. J. P. Morgan & Co., 23 Wall Street, New York, of an equivalent sum in dollars (United States) calculated at the fixed rate of exchange of 4.86 dollars to the £ ; or

(*c*) at the office of Nederlandsche Handel Maatschappij N.V. Amsterdam of an equivalent sum in Dutch florins, calculated at the fixed rate of exchange of florins 12.11 to the £.

During the material period the only debentures which had been issued were registered debentures. Some of the debenture holders who received interest warrants to which this appeal related were transferees.

By the trust deed it was provided (inter alia) as follows: Clause 2. "The company hereby covenants with the trustees that the company will as and when the same shall become payable . . . . pay to the trustees at the registered office of the company the aggregate amount for the time being secured by the debentures together with any premiums in respect thereof and will in the meantime pay to the trustees interest on the aggregate nominal amount of the debentures for the time being outstanding as follows:—

> In respect of the period ending 30th June, 1931, at the rate of 8*s*. 3*d*. per cent.,
>
> In respect of the period ending 31st December, 1931, at the rate of 2*l*. 3*s*. 9*d*. per cent.,
>
> In respect of the period ending 30th June, 1932, at the rate of 3*l*. 6*s*. 10*d*. per cent.,

and thereafter at the rate of 7 per cent. per annum by equal half-yearly payments on the 30th day of June and the 31st day of December in each year. All such interest to be subject to United Kingdom income tax. Provided that every payment made by the company to the debenture holders in respect of principal monies premiums or interest upon the debentures held by them respectively shall be a satisfaction pro tanto of the covenant by the company in this clause contained."

Clause 5 provided that the principal moneys, premiums and interest should be a first charge on the property thereby charged and stated that the debentures were issued upon and subject to the conditions in the first and second parts respectively of the First Schedule thereto as the case might require.

By clause 20 (10.) the company covenanted with the trustees to issue to every debenture holder a registered debenture in the form set out in the first part of the First Schedule to the trust deed.

Para. 1 of the registered debenture provided as follows :—

> " Rhokana Corporation Limited (hereinafter called ' the Company ') will on 31st December, 1950, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon pay to of
>
> or other the registered holder for the time being of this debenture the principal sum of pounds sterling together with any premium that may be payable pursuant to the conditions indorsed hereon or the below mentioned trust deed or the equivalent thereof in United States American dollars at the rate of $4.86 to the £ or in Dutch florins at the rate of 12.11 Dutch florins to the £."

Para. 2 of the said debenture repeated the provision in clause 2 of the trust deed as to payment of interest during the broken periods and thereafter at 7 per cent. per annum.

By condition 11 of the Conditions indorsed on the said debenture it was provided as follows :—

> " The principal moneys premium (if any) and interest hereby secured shall be paid in sterling at Barclays Bank Ld. 54 Lombard Street London or other the banks of the company in London for the time being or at the registered office of the company or in U.S.A. dollars at the fixed rate of exchange of 4.86 dollars to the £ at the offices of Messrs. J. P. Morgan & Co. 23 Wall Street New York or in Dutch florins calculated at the fixed rate of exchange of 12.11 Dutch florins to the £ at the offices of Nederlandsche Handel Maatschappij N.V. Amsterdam. The interest on registered debentures will be paid by cheque or warrant on the Company's banks sent through the post to the registered address of the holder . . . . ; and every such cheque or warrant shall be payable to the order of the person to whom it is sent and payment of the cheque or warrant if purporting to be duly indorsed shall be a satisfaction of the interest."

On June 30, 1931, and December 31, 1931, interest in respect of the said debentures became due in accordance with para. 2 of the debenture. In respect of this interest the

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company sent by post to the registered holders of the said debenture warrants net amounts in sterling computed as follows:—

	Gross.	Net.	Tax.
30th June, 1931 (tax deducted at 4*s.* 6*d.*) .	£18,562 10 0	£14,385 18 9	£4,176 11 3
31st Dec., 1931 (tax deducted at 5*s.* 1·13*d.*) .	£98,436 8 2	£73,363 16 8	£25,072 11 6
Total .	£116,998 18 2	£87,749 15 5	£29,249 2 9

The company was assessed to income tax under r. 21 in respect of interest amounting to 116,998*l.* 18*s.* 2*d.* and income tax thereon was duly paid.

A specimen copy of a warrant for interest with a certificate of deduction of tax attached and drawn on Barclays Bank, Ld., ... in favour of Rhodesian Anglo-American, Ld., for 41,450*l.* 4*s.* 3*d.* formed part of the Case. Each warrant contained the following footnote: "Payable at the option of the holder in sterling at Barclays Bank London or in dollars (calculated at the fixed rate of exchange of $4.86 to the £) at the offices of J. P. Morgan & Co., New York, or in Dutch florins (calculated at the fixed rate of exchange of florins 12.11 to the £) in Amsterdam." The warrant in question was sold by Rhodesian Anglo-American, Ld., in London to Morgan Grenfell & Co., and was presented for payment at the office of J. P. Morgan & Co., 23 Wall Street, New York, on January 9, 1932, and 201,448 dollars were received in payment therefor, that is to say 41,450*l.* 4*s.* 3*d.* converted into dollars at the fixed rate of exchange of 4.86 dollars to the £. Of the interest warrants dated June 30, 1931, practically all, amounting to 14,385*l.* 18*s.* 9*d.*, were cashed in sterling.

Owing to the depreciation of the £ which took place in October, 1931, when England went off the gold standard, many holders of registered debentures in the exercise of their option encashed their December interest warrants in New York or Amsterdam.

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The warrants dated December 31, 1931, amounting in all on the face of them to the net sum of 73,363*l.* 16*s.* 8*d.*, were cashed as follows :—

In London (net face value of warrants as above) .	£1,179	2	8	Cashed in sterling £1,179 2 8
In New York (net face value of warrants as above) .	£72,171	13	1	Cashed in $ at 4.86 $350,754.12
In Amsterdam (net face value of warrants as above)	£7	14	11	Cashed in florins at 12.11 Fl. 93.62
Not yet presented .	£5	6	0	
	£73,363	16	8	

The additional assessment under appeal was computed as follows :—

Total payments of interest converted when necessary into sterling :—

June, 1931	£14,385	18	9
December, 1931	104,662	15	5
	£119,048	14	2
Add for tax at 5*s*.	39,682	18	1
	£158,731	12	3
Less first assessment	116,998	18	2
	£41,732	14	1

The figure for December, 1931, was made up as follows :—

Warrants cashed in sterling	£1,179	2	8
Warrants outstanding	5	6	0
Warrants cashed in dollars $350,754.12 converted at 3.39 to the £, the rate estimated by the Revenue to be middle rate of exchange on December 31, 1931	103,467	5	8
Warrants cashed in florins 93.62 converted at 8.46 florins to the £, the estimated middle rate as above	11	1	1
	£104,662	15	5

The warrants dated December 31, 1931, which were cashed in New York and Amsterdam were cashed at various dates subsequent to December 31, 1931. The rates of exchange prevailing at the dates when they were cashed were not the same as the rates prevailing on December 31, 1931.

It was contended on behalf of the company that :—

(*a*) the company was assessable under r. 21 of the All Schedules Rules upon payment of interest;

(*b*) the interest had been paid by the company by the posting of the interest warrants to the debenture holders;

(*c*) in respect of this payment of interest the company had already been assessed and paid income tax;

(*d*) under the terms of the trust deed the company had the option to pay in sterling or foreign currency;

(*e*) the additional assessment should be discharged.

Alternatively :—

(*f*) the machinery of r. 21 was inapplicable to payments of interest in foreign currency.

It was contended on behalf of the Crown :—

(*a*) that where a warrant was paid by the company's agents in New York in dollars or in Amsterdam in florins, the payment was a payment of interest in dollars or florins respectively, and not in sterling;

(*b*) that for the purposes of r. 21 such a payment in dollars or florins must be converted into sterling at the rate of exchange current on the due date of payment;

(*c*) that the cost of currency utilized to pay the debenture interest was irrelevant and had not been investigated on behalf of the Crown;

(*d*) that the additional assessment under appeal was correctly made in principle and subject to any necessary adjustment of figures should be confirmed.

The Commissioners were of opinion upon the facts and upon the true construction of condition 11 of the debentures the company could not be said to have paid interest until the holder of the warrant had exercised his option. A person exercising his option to be paid in dollars or florins was never paid in fact anything but dollars or florins in satisfaction of the interest. They therefore held that in computing the amount of interest paid by the company for the purposes of r. 21 of the All Schedules Rules the amount of dollars or florins paid, i.e., the amount corresponding at the respective fixed rates of exchange to the gross amount of sterling interest indicated on the relative certificates, must be included at their sterling value at the date when the interest fell due. They therefore confirmed the assessment under appeal in principle and left the final adjustment of figures to the parties.

Further hearings were held on December 12, 1934, and March 6, 1935, to settle points regarded by the company as either not having been settled by the above decision or left doubtful on the interpretation of that decision. The Commissioners held that the taxpayer cashing a dividend in New York should be regarded as having dollars in New York, so that the correct rate to be adopted for valuing the payment was the selling rate in New York or London; that for the purpose of reconversion of dollars into sterling the rate most favourable to the company on December 31, 1931, should be adopted; and that the amount of sterling interest to be converted into dollars and reconverted into sterling was the gross amount of sterling interest indicated on the certificates attached to the dividend warrants. The correct additional liability of the company under r. 21 based on their decision was 41, 578*l.* 6*s.*11*d.*, and they reduced the assessment under appeal to that figure.

On appeal from the Commissioners' decision. Lawrence J. said that the company appealed against an additional assessment in respect of a sum of 41,578*l.* 6*s.* 11*d.* alleged by the Revenue authorities to be "interest on money" within r. 21 of the All Schedules Rules. The Commissioners held that the sum to be deducted in payment of the 7 per cent. debenture interest in cases where the warrant was cashed in America was the dollar value of the tax calculated at $4.86 to the pound and converted into sterling at the rate of exchange ruling on the day on which the debenture interest was due.

Clause 2 of the trust deed provided for payment to the registered holder of interest at sterling rates on June 30 and December 31, which by condition 11 was to be paid by cheque or warrant sent through the post. In his opinion therefore interest was paid and tax had to be deducted when the warrant was posted. The company when it posted its warrants could not tell when, where or by whom they would be presented for encashment; and it could not tell what would be the rate of exchange then ruling. It followed that the company could not deduct income tax in the manner contended for by the Crown. If the company had the option to pay in sterling, it could clearly have discharged its obligations by paying a net sum in sterling; if the debenture holder had or was conceded the option of taking dollars, the company could not compel him to exercise his option before the warrant was posted. There was no provision for a deduction of income tax in suspense. Rule 21 provides for deduction upon payment and at the rate in force at the time of payment; but the company could not deduct the income tax calculated in dollars until it knew whether the warrants would be cashed in dollars, nor was there any provision for deduction of income tax in all three currencies. Moreover he thought that r. 21 did not refer to payment outside the United Kingdom, and the payment in dollars was only to be made in New York. *S.S. Celia* v. *S.S. Volturno* (1); *In re British American Continental Bank. Goldzieher & Penso's Claim* (2); and *In re British Continental Bank* (3), laid down that a contract to pay in foreign currency was a contract to provide a commodity; and such a commodity was not interest on money within r. 21. The true view was, he thought, that the right to get dollars or guilders was an added right, which did not affect the interest on the debentures, which was payable as interest in sterling, and r. 21 had no application to the added right. The appeal must therefore be allowed with costs and the additional assessment discharged.

The Crown appealed. The appeal was heard on February 4, 5 and 8 and judgment given on March 4, 1937.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. In this case the provisions as to payment of interest do not confer rights to dollars or guilders as added rights. The rights to be paid in sterling, dollars or guilders are alternate and mutually exclusive: compare *International Trustee for Protection of Bondholders Aktiengesellschaft* v. *The King.* (1)

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(1) [1921] 2 A. C. 544.
(2) [1922] 2 Ch. 575.
(3) [1923] 1 Ch. 276.

[LORD WRIGHT M.R. If a sterling debt had to be paid in a foreign country, it would be paid in the currency of that country.]

There might be a form of contract providing for payment in sterling, but even so, on default the proceedings to enforce the right would involve claiming it in the foreign currency. What makes all the difference here is that a fixed rate of exchange for payment in the foreign currency is provided regardless of what the rate may then be. The dividend warrant in effect therefore provides for payment of so many pounds or so many dollars or so many guilders at the recipient's option. Therefore the decision of Lawrence J. on the main question cannot stand. As soon as the option has been exercised by obtaining payment in New York, the tax is payable in respect of the number of dollars received when converted into sterling at the current rate of exchange. There is a single debt capable of being satisfied in three different ways, and when the option has been exercised in the way suggested it becomes a dollar debt. It is incorrect to say that foreign currency is a commodity. Thus an action for money had and received will lie in respect of foreign currency: *Ehrensperger* v. *Anderson.* (2) So too a contract for sale of goods in a foreign currency is treated as a contract for the sale of goods: *Peyrae* v. *Wilkinson* (3); and see the Bills of Exchange Act, 1882, s. 72, sub-s. 4. No doubt income tax in this country is measured in pounds and pence: compare *Payne* v. *Deputy Federal Commissioner of Taxation.* (4) But interest payable in foreign currency can easily have its value ascertained in English currency and the tax paid thereon. No final evaluation for purposes of tax can be made in the present case until it is known which option is exercised by the holders of the warrants. The payment is not completed till the amount is ascertained. There is no reason to give

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(1) (1936) 53 Times L. R. 64, 71.

(2) (1848) 3 Ex. 148, 156.

(3) [1924] 2 K. B. 166.

(4) [1936] A. C. 497, 508.

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the word "payment" in r. 21 anything but its natural meaning.

Again the proper date for converting the dollars into sterling is strictly December 31, but the Crown is prepared to accept the view that the valuation of dollars should be at the date when in the ordinary course of business a warrant could be presented for payment in New York.

[They also referred to *Thairlwall* v. *Great Northern Ry. Co.* (1); *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (2); *Universal Life Assurance Co.* v. *Bishop* (3); and *Scottish Provident Institution* v. *Farmer.* (4)]

Latter K.C. and *Andrewes-Uthwatt* for the company. The liability of the company is limited to the sum deducted from the amount in sterling originally due as interest on the debentures. If there was any further payment of interest as the result of payment being taken in dollars or guilders, it is not interest to which r. 21 applies. In the trust deed the company covenanted to pay interest in sterling, but the recipient was given an option to take payment in dollars in New York or in guilders in Amsterdam. That cannot affect the sum due from the company under r. 21 in payment of the interest. The posting of the warrant is the payment of the interest, and thereupon the tax deducted becomes immediately payable to the Crown: *Thairlwall* v. *Great Northern Ry. Co.* (1); and see *Reed* v. *Kilburn Co-operative Society.* (5)

The warrant here issued by the company only provides additional ways in which interest primarily payable in sterling can be collected. For the purpose of deciding what tax is payable regard must be had to the express words of the taxing statute, the words of which must expressly fit the case. No liability can be imposed by analogy. The Crown does not tax by analogy. Under the taxing statutes the tax is levied at so many shillings and pence to the £ and it is not a percentage tax. Hence the relevant provision is r. 21 of the All Schedules Rules to the Income Tax Act, 1918. Considered in the light of ss. 1 and 3 of the Act and the charging section in the Finance Act of each year fixing the shillings and pence payable on every £ of income, r. 21 can only be applicable to a person paying a sum in sterling. Further under r. 21 as soon as the deduction has been made on payment of yearly interest an account is to be submitted to the Crown. The sum deducted is a debt to the Crown. The words there are not apt to cover a deduction of a percentage corresponding to the sum of so many shillings and pence in the £. It is said that foreign currency is easily convertible into sterling, but wheat or sugar has a market value which is just as easily ascertainable. Those commodities are on a par with foreign currency.

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(1) [1910] 2 K. B. 509.
(2) (1886) 2 Tax Cas. 165.
(3) (1899) 4 Tax Cas. 139.
(4) (1912) 6 Tax Cas. 34.
(5) (1875) L. R. 10 Q. B. 264.

[GREENE L.J. Is not the deduction to be made under r. 21 a mere accountancy matter and might not deduction be made from dollars by evaluating them in sterling ?]

In order to effect a deduction like must be taken from like. Here cash must be deducted. There is nothing in r. 21 to indicate that a percentage deduction may be made or a deduction from the dividend in dollars when converted into sterling.

Assuming, however, that the company is wrong on this main contention the question arises what amount is convertible into dollars at the recipient's option. Clearly it is only the net sum of sterling after tax has been deducted. An increased tax can then only be payable on the increased value of this amount of dollars when reconverted into sterling. There cannot under the covenant to pay interest be an obligation to pay without deducting tax. The Revenue claim to have the whole gross amount of interest treated as a notional payment in dollars, but the obligation under the dividend warrant is satisfied by a payment of the net amount after deducting tax. Further the dollars should be converted into sterling at the rate in force when the debenture holder exercised his option by taking payment in dollars: *In re British American Continental Bank. Goldzieher and Penso's Claim* (1); *In re British American Continental Bank. Credit*

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(1) [1922] 2 Ch. 575.

General Liegeois' Claim (1); *S.S. Celia* v. *S.S. Volturno* (2); and *Richardson* v. *Richardson.* (3)

[They also referred to *Inland Revenue Commissioners* v. *Baillie.* (4)]

Sir Donald Somervell A.-G. in reply. In order to ascertain the proper amount to be paid in tax when payment of the interest is taken in dollars, the sum that would be deducted on a sterling payment must be converted into dollars at the fixed rate and reconverted at the current rate. As to the date when the dollars should be reconverted into sterling it is suggested that the date should be taken when the debenture holders might reasonably be expected to present their warrants for payment in dollars in New York. In regard to the main question, rr. 19 and 21 must be construed on the same footing, and in r. 19 the words "in or out of the United Kingdom" appear. Their omission in r. 21 is accounted for by the later date when this provision first became law, and they are in effect incorporated by other provisions in the Income Tax Act, 1918: see the rules applicable to Case III. of Sch. D, r. 1. There is really no ground for the suggestion that the Act does not cover payments in foreign currency.

Cur. adv. vult.

1937. March 4. LORD WRIGHT M.R. The judgment which I am about to deliver is the judgment of the Court, composed of ROMER and GREENE L.JJ. and myself.

This appeal raises questions of some difficulty and complexity, relating to the application of r. 21 of the All Schedules Rules to the payment of interest on debentures of an English company, where payment is made abroad in foreign currency in virtue of an option contained in the debenture. The interest was subject to United Kingdom income tax, and was payable in sterling in London, or in dollars in New York, or in guilders in Amsterdam. Warrants were posted to registered holders setting out the amounts payable in sterling; but also stating the options as to currency and place of payment and defining specific rates for conversion into dollars or guilders. Of the warrants for the half-year ending December, 1931, by far the greatest proportion were presented and paid in dollars in New York, converted from sterling at the contract rate of $4.86 to the £. But as the actual rate of exchange was in the neighbourhood of $3.40 to the £, the payments made, converted back at the actual rates into sterling, represented a much larger sum in sterling than appeared in the sterling sum set out on the face of the warrant. A first assessment was made based on the sterling sum expressed on the face of the warrant. Subsequently an additional assessment was made to correspond with what the corporation had actually paid by way of interest in dollars, when the payment was converted back at the actual rate of exchange as compared with the conventional rate. The Special Commissioners upheld that assessment. Their decision was set aside by Lawrence J. The Crown appeal from his decision. No actual figures have been discussed before this Court, save such as are necessary to elucidate the principles involved. The additional assessment as found by the Special Commissioners was in the sum of 41,578*l.* 6*s.* 11*d.* as representing the difference between the total sum at the sterling amounts shown on the warrants, and the actual value in sterling of the currency payments, the difference being due to the divergence of the actual exchange rates from the conventional rates.

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(1) [1922] 2 Ch. 589.
(2) [1921] 2 A. C. 544.
(3) [1927] P. 228.
(4) (1936) 20 Tax Cas. 187, 190.

The appellant corporation had issued in April, 1931, 4,500,000*l.* 7 per cent. 20-year debentures, secured on the assets of the company by means of a trust deed. At the material times the debentures so issued were all in the form of registered debentures. The registered debenture provided, so far as it is material, for payment to the registered holder of the principal sum consisting of the relevant number of pounds sterling or the equivalent thereof in United States of American dollars at the rate of $4.86 to the £, or in Dutch florins at the rate of 12.11 Dutch florins to the £ It also provided for interest on the principal sum at various rates up to June 30, 1932, and thereafter at the rate of 7 per cent. per annum by equal half-yearly payments. "Such interest to be subject to United Kingdom income tax." One of the indorsed conditions to which the debenture was subject was condition 11 [His Lordship read the Condition.] We shall later state how we construe that condition.

The debenture interest in question in these proceedings was the interest falling due on June 30, 1931, and December 31, 1931, respectively. Warrants were posted in due course to the registered holders for the net amount due shown in sterling, but with a clause setting out the dollar and guilder option. A specimen warrant was used for purposes of illustration. It was dated December 31, 1931, addressed to Barclays Bank Ld., 54 Lombard Street, E.C. 3, payable to the particular named holder "or order" and was for 41,450*l.* 4*s.* 3*d.* At the foot was this clause: "Payable at the option of the holder in sterling at Barclays Bank Limited, 54 Lombard Street, London, E.C.3, or in dollars (calculated at the fixed rate of exchange of $4.86 to the £) at the offices of Messrs. J. P. Morgan & Co., 23 Wall Street, New York, or in Dutch florins (calculated at the fixed rate of exchange of 12.11 florins to the £) at the Nederlandsche Handel Maatschappij N.V. Amsterdam C. Note: This warrant, if presented in New York or in Amsterdam, must lie four days for examination." The warrant was crossed "not negotiable"; in any case, it was not a bill of exchange, though assignable. Attached to the warrant was a certificate showing the gross amount in sterling 55,616*l.* 1*s.* 11*d.*, less British income tax 14,165*l.* 17*s.* 8*d.*, net amount payable 41,450*l.* 4*s.* 3*d.* The corporation also certified that the income tax deducted as shown has been or will be duly paid by the corporation to the proper tax officer. There was a note at the foot that the certificate would be accepted by the Inland Revenue Authorities as proof of deduction of tax. The corporation presumably purported by this certificate to comply with s. 33 of the Finance Act, 1924. The certificate was obviously imperfect so far as it disregarded the dollar and guilder options which were expressly stated in the warrant; the certificate, however, could not determine the rights of the debenture-holder or the rights of the Inland Revenue.

In December, 1931, owing to the financial crisis, by reason of which England went off the gold standard, the £ sterling had depreciated. In consequence it was profitable for holders of the debentures to exercise their dollar option. The total net face value expressed in sterling of the debenture interest due in December was 73,363*l.* 16*s.* 8*d.* In respect of that interest, warrants were cashed in New York to the total amount, on the basis of the net face value shown in the warrants in sterling, of 72,171*l.* 13*s.* 1*d.*; the actual sums paid, corresponding to this total of sterling converted into dollars at $4.86 to the £, came to $350,754.12, which when converted back into sterling corresponded to a payment of 103,467*l.* 5*s.* 8*d.*, that is, if the rate of exchange of $3.39 to the £ prevailing on December 31, 1931, is taken. That figure may be adopted here, for purposes of illustration, but it is subject to readjustment if the actual dates of payment in New York are to be regarded. That figure is the net figure paid after deduction of British income tax in accordance with the debenture conditions. Notionally what was paid was the gross amount in dollars. Hence the Revenue Authorities have based their assessment under r. 21 on the gross figure, which for convenience they have arrived at by taking the net figure of 104,662*l.* 15*s.* 3*d.* (a figure which includes not only the dollar payments, but some smaller amounts paid in sterling and guilders respectively) and adding on the appropriate tax (or "grossing up") so as to arrive at the true gross figure in sterling.

In the first place the corporation had been assessed simply on the sterling figures shown on the face of the certificate, disregarding the currency options and the actual payments. The Revenue made a further assessment on the basis of the dollar payments actually made and also the less important guilder payments. This assessment, which also included the June interest, was computed as follows: Total payment of interest converted where necessary into sterling: June, 1931, 14,385*l.* 18*s.* 9*d.*; December, 1931, 104,662*l.* 15*s.* 5*d.*, making 119,048*l.* 14*s.* 2*d.* Add for tax at 5*s.*, 39,682*l.* 18*s.* 1*d.*, making 158,731*l.* 12*s.* 3*d.* Less first assessment, 116,998*l.* 18*s.* 2*d.*; leaving 41,732*l.* 14*s.* 1*d.* Owing to certain adjustments, the Special Commissioners reduced this figure to 41,578*l.* 6*s.* 11*d.* It may in any event require some further minor adjustments. In effect the view of the Commissioners was that there was in each case no payment of interest under condition 11 quoted above until the holder had exercised his option by presenting the warrant for payment; if he exercised his option to be paid in dollars or guilders, there was no payment of anything but dollars or florins in satisfaction of his interest; accordingly in computing under r. 21 the amount of interest paid by the corporation, "the amount corresponding at the respective fixed rates of exchange to the gross amount of sterling interest indicated on the relative certificates must be included at their sterling value" at the relevant date or dates.

Lawrence J., in setting aside this assessment, was of opinion that r. 21 does not refer to payments outside the United Kingdom, and that a contract to pay in foreign currency is a contract to provide a commodity, which is not interest of money within r. 21. He concluded that the right to get dollars or guilders was an added right, which did not affect the interest on these debentures because that was payable in sterling and that r. 21 had no application to the added right. With great deference to the learned judge, we find ourselves in disagreement with his judgment.

Before dealing with the application of r. 21 to such a case as this, it will be convenient to state what in our opinion is the meaning of the debenture and of the certificate and warrant. We think that the option is the holder's option given to him for his benefit and is exercisable by him. He cannot exercise it till he receives the documents and he cannot claim payment until he has indorsed the warrant. But condition 11, which includes both these terms or conditions, also contains a term that the interest will be paid by cheque sent through the post to the registered address of the holder. This we think refers to the initial machinery for effecting payment; at most it can merely mean that the corporation is not bound to give a duplicate warrant except on an indemnity: see per Bray J. in

Thairlwall v. *Great Northern Ry. Co.* (1) Payment in the full sense is dealt with in the final words of the condition: "Payment of the cheque or warrant if purporting to be duly indorsed shall be a satisfaction of the warrant." That in our opinion means payment at the place and in the currency selected by the holder in the exercise of his option. Such payment is obviously subsequent to the posting of the warrant. Further, there is only one payment, as for instance in New York in dollars if the holder or his indorsee (for the holder may sell his warrant which is to his order) so elects. It is not the case that there is a payment limited to a payment in sterling when the warrant is posted, and a separate and subsequent payment in dollars if the dollar option is exercised; and furthermore, the deduction of tax under r. 21 is only made when the payment is made. The deduction is actually effected by paying the net amount. The warrant accordingly is for the net amount and nothing else, and does not show the deduction. Some confusion has been caused because the sums shown on the certificate as the gross sum, the tax deduction, and the net sum, are shown merely in sterling, and the net sum in the warrant is merely in sterling. Strictly speaking they should have been in all three currencies; indeed in the warrant, as the fixed rates are set out, the dollar or guilder amounts are impliedly stated; nothing is required but an arithmetical calculation, easily done by the paying bank or by the holder if he desires. But the same is really true of the certificate, because the holder knows that the sterling sums are capable of transliteration into the corresponding dollar or guilder sums. Much of the confusion in the case, as we think, is due to the failure to set out in figures in the certificate and in the warrant the three optional sums. The warrant is as much a dollar or guilder warrant as a sterling warrant; and if the certificate had shown the gross sum, the deduction, and the net sum in dollars and guilders as well as in sterling, that is, in all three currencies, the difficulty about making the deduction on the warrant, which impressed the judge, could not have been felt. In our opinion, the conception that the obligation expressed in the certificate and the warrant is primarily a sterling obligation is partly due to a failure to appreciate that the three optional currencies, sterling, dollar and guilder, are on the same level; that is to say, that it depends on the holder what currency will apply; and partly to an idea that sterling is the primary currency and that payment in one of the other currencies is something superadded. In fact, there is only one payment, single and indivisible, which takes place once for all at the place and in the currency selected by or on behalf of the holder. As we have already indicated, the confusion is partly due to the circumstance that the certificate shows the deduction only in sterling. But the deduction under r. 21 must be made upon payment. Writing out and posting the certificate and warrant do not constitute payment. It might be questioned whether what was done in this respect constituted a fulfilment of s. 33 of the Finance Act, 1934, though to the holder the sterling amounts were translatable under condition 11 into dollars or guilders; but however that may be it would not affect the position under r. 21.

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(1) [1910] 2 K. B. 509.

In our opinion r. 21 applies to the dollar or guilder payments in this case. We think the payment (e.g.) of the $201,448 in New York was a payment of interest of money within the meaning of the rule, after deducting therefrom a sum representing the amount of tax at the appropriate rate. We think that payment of the sum of dollars constituted a payment of money, though it is necessary in order to bring the dollars into computation for United Kingdom income tax to turn them into sterling; and we think that the payment would not be less within r. 21 because made out of the United Kingdom, and that the payment was duly made after deduction of tax. The warrant read as a whole, taking into account the optional clause at the foot, was a warrant for (inter alia) $201,448, which was the proper net amount; all that the clerk at J. P. Morgan & Co.'s office in New York had to do was to convert the sterling amount expressed at the specified rate of exchange. The tax was deducted in the usual way, because the amount was not paid, but remained in the corporation's pocket. We can find in r. 21 no justification for the view that the rule is limited to payments made in the United Kingdom. Rule 21 relates to interest of money charged with tax under Sch. D. If reference is made to r. 1 of the rules applicable to Case IV. of Sch. D, that rule expressly deals with foreign income whether received in the United Kingdom or not, subject (inter alia) to a deduction on account of any annual interest payable out of the income to a person not resident in the United Kingdom. That rule clearly deals with financial transactions abroad, and cannot reasonably be construed as applying only to transactions in sterling. Foreign money is clearly included, or at least, is clearly not excluded. If it were said that a taxpayer is taxed under that rule on his profits, and that it does not matter whether the profits reach him in money or goods, that is true enough, but irrelevant ; in any case the provision for the deduction on account of annual interest in a foreign country shows that a deduction within the meaning of the Act may be a deduction of foreign currency from foreign currency. Similarly Case V. must, we think, cover foreign income in foreign currency. Apart from the language of these rules, any other view would be difficult to accept in a country like this, whose inhabitants are constantly engaged in international trade, own large foreign properties, landed and otherwise, and hold immense amounts of foreign stocks and shares and are subject to heavy liabilities, on which interest is payable. All these may involve not only receipt but payments or deductions in foreign currency. Indeed the system of taxation of the United Kingdom could not function unless it recognized foreign currency ; this is not less true because obviously that currency must be reduced to sterling in order to be brought into computation for United Kingdom tax purposes. This principle was clearly recognized in the decision of the Judicial Committee in *Payne* v. *Deputy Federal Commissioner of Taxation* (1), which related to Australian tax. We may further note that r. 19, which is comparable to r. 21, expressly specifies as coming within its scope, any yearly interest of money, etc., " whether payable within or out of the

(1) [1936] A. C. 497.

United Kingdom, either as a charge on any property of any person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation." This language expressly brings within its scope payments of interest made out of the United Kingdom, and does not limit its scope to sterling transactions. It is true that these words are not repeated in r. 21; but that rule was much later in the date of its first introduction and the draftsman may well have thought that the shorter language he used was by reason of the context sufficient. In any case we cannot find, either in the language or the policy of r. 21, any possibility of limiting it so as to exclude from its application interest paid outside the United Kingdom, or interest paid in foreign currency. The truth is that the words "payment of any interest of money, annuity or other annual payment charged with Tax under Schedule D," read in connection with the machinery for "deduction" provided for in r. 21 are, in the context of the Income Tax Act, wide enough to cover not merely transactions effected in what is legal tender in the United Kingdom but also everything which is in a commercial sense a "payment" upon the making of which the statutory "deduction" can be made. Thus it includes payment by cheque or bill of exchange, by transfer of, for example, War Loan or any other marketable security, or by the making of credit entries in books of account. We can see no reason for excluding what is no less a payment, namely the discharge of an obligation expressed in foreign currency. As in the case of a transfer of War Loan, so in the case of a delivery of foreign currency, the value of what is transferred or delivered can without difficulty be translated into terms of English money; and the deduction of tax which the rule requires to be made presents no difficulty whatever. In all these cases there is in our judgment both a "payment" and a "deduction" within the meaning of the rule. There is no substance in the argument that the "sum representing the amount of tax" is necessarily a sum expressed in British currency; and that it is not possible to "deduct" British from foreign currency. In the case of e.g. a dollar payment, the sum of dollars by which the contractual payment is diminished in order to comply with the provisions of the rule as to deduction is in our judgment a "sum representing the amount of tax," notwithstanding the fact that before deduction can take place a calculation based on the sterling value of the dollar must be made. To sum up this matter, we think that "interest of money" in r. 21 includes interest paid in foreign currency.

For all these reasons, we agree in principle with the conclusions of the Special Commissioners, and we think that the appeal should be allowed, the judgment of Lawrence J. set aside, and the order of the Special Commissioners restored, with, however, some variations, because we do not agree with their view that the relevant date for conversion from dollars into sterling is the date when the debenture interest fell due, December 31, 1931, but think that the dates of the actual payments, which were somewhat later, are the right dates to take. This is more advantageous to the tax-payer; but the Crown do not object to these later dates being taken.

The appeal will be allowed with costs.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Holmes, Son & Pott.*

H. C. G.

1937
Feb. 2, 3.

KING *v.* BULL.

Post-office—Wireless telegraphy—Central receiving set in block of flats—Connection by wire to separate flat—Loud-speaker and plug in flat—Reception of wireless programme by insertion of plug connecting with wire—Necessity for licence for tenant of flat—Wireless Telegraphy Act, 1904 (4 *Edw.* 7, *c.* 24), *s.* 1, *sub-s.* 3.

The landlords of a block of flats installed therein a wireless receiving set for which they paid the 10*s.* licence. The set was fitted with an amplifier, which was connected by wires to a socket in each flat, including that of the respondent. In this flat the respondent had installed a loud-speaker with a wire and plug, and by inserting the plug into the socket he had from time to time received broadcast programmes. The operation and tuning of the receiving set was under the landlords' control, and it was switched off by them nightly at 11 o'clock. The respondent had no wireless licence :—

Held, that the respondent had "worked" an "apparatus for wireless telegraphy without a licence" within the meaning of s. 1, sub-s. 3, of the Wireless Telegraphy Act, 1904.

CASE stated by a Metropolitan police magistrate.

At a court of summary jurisdiction sitting at Marylebone on November 11 and 18, 1936, an information was preferred by the appellant, Albert Samuel King, on behalf of the Postmaster-General, against the respondent, Hilary Carol Howard Bull, for that he on a day unknown between a period six months prior to the laying of the information and July 28, 1936, at 2 Princess Court, Marylebone, unlawfully did work apparatus for wireless telegraphy without a licence contrary to s. 1, sub-s. 3, of the Wireless Telegraphy Act, 1904.

The following facts were proved or admitted: The respondent was the tenant of a self-contained flat being one of a block of similar flats at Princess Court aforesaid. There were installed in the said block by the landlords two wireless receiving sets, for each of which they were liable to pay the ten shillings receiving licence. Each set was fitted with an amplifier connected by wires to a corresponding socket installed in each of the said flats, including that of the respondent. In his flat the respondent had installed a loud-speaker fitted with a wire and a plug, which plug he had from time to time inserted into one or other of the said sockets, and had thereby received the broadcast programme from either the National or Regional station. The respondent did not have a wireless licence. The operation and tuning of the two sets were under the control of the landlords, and they were switched off by them at 11 P.M.

It was contended for the appellant that the loud-speaker, wire and plugs installed in the respondent's premises were apparatus for wireless telegraphy within s. 1, sub-s. 3, of the Act of 1904, and that the respondent had worked the loud-speaker by inserting the plug into the sockets.

The magistrate dismissed the information, but stated this case.

Sir Terence O'Connor S.-G. and *J. P. Ashworth* for the appellant. The charge is one of working an apparatus for wireless telegraphy without a licence, contrary to s. 1, sub-s. 3, of the Wireless Telegraphy Act, 1904. (1) The loud-speaker, installed by the respondent in his flat was " apparatus for wireless telegraphy " within the meaning of s. 1, sub-s. 3, of the Act of 1904, although it may be only part of a larger whole. Webster's Dictionary defines " apparatus " as an

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(1) The Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 3: " The term ' telegraph ' means a wire or wires used for the purpose of telegraphic communication, ... and any apparatus connected therewith for the purpose of telegraphic communication."

The Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 3: " The term ' telegraph ' shall, in addition to the meaning assigned to it in the Telegraph Act, 1863, mean and include any apparatus for transmitting messages or other communications by means of electric signals."

The Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 1, sub-s. 3: " If any person . . . . instals or works any apparatus for wireless telegraphy without a licence in that behalf, he shall be guilty of a misdemeanour. . . . ."

Sub-s. 7: " The expression ' wireless telegraphy ' means any system of communication by telegraph as defined in the Telegraph Acts, 1863 to 1904, without the aid of any wire connecting the points from and at which the messages or other communications are sent and received. . . . ."

The Wireless Telegraphy (Explanation) Act, 1925 (15 & 16 Geo. 5, c. 67), s. 1: " For removing doubts as to the meaning of certain expressions in the Wireless Telegraphy Act, 1904, it is hereby declared that: (1.) The expression ' transmission ' where used in sub-section (7) of section one and section two of that Act in relation to messages includes, and shall be deemed always to have included, the reception as well as the sending of messages."

"appliance . . . . for a specific action or operation," and to work it would be to set it in action, cause it to act. No doubt the landlords had to do something, but it does not follow that the respondent had nothing to do. When he put the plug into the socket he was working the wireless apparatus and received the communication—i.e., the wireless programme —he sought, and he could get it in no other way.

[*Attorney-General* v. *Edison Telephone Co. of London* (1) was also referred to.]

Maxwell Fyfe K.C. and *Hugh Saunders* for the respondent. The Act of 1904 had for one of its objects national security and the prevention of misuse of wireless telegraphy, and where it is attempted to apply it to a case like the present, where no question of national security arises, it should be construed strictly against the Crown. There are three questions: firstly, whether the loud-speaker was an "apparatus" within the meaning of s. 1, sub-s. 3, of the Act (2); secondly, whether it was apparatus for wireless telegraphy; and, thirdly, whether plugging in was "working" within the sub-section. "Apparatus" is not a word appropriate to describe a single thing like a loud-speaker, but implies a conglomeration of machinery or instruments. A loud-speaker would be more properly described as an instrument. The "apparatus" was the receiving set, and all the respondent did was to tap the results. Wireless telegraphy ceased when the sound waves reached the receiving set. The transmission of the sound from the receiving set along a wire to the loud-speaker may be telegraphy—see s. 3 of the Telegraph Act, 1863 (2), and s. 3 of the Telegraph Act, 1869 (2)—but it is not wireless telegraphy as defined in s. 1, sub-s. 7, of the Act of 1904 (2), and, therefore, was not "apparatus for wireless telegraphy" within the meaning of sub-s. 3 of that section. When the respondent plugged in he was not "working" the apparatus; the working was done by the landlords when they tuned in to the receiving set, the apparatus. The licence allows the licence-holder to receive the wireless broadcast, but not to receive it over a wire. In *Attorney-General* v. *Edison*

(1) (1880) 6 Q. B. D. 244.

(2) See note (1) ante, p. 811.

Telephone Co. of London (1) it was held that the telephone was a telegraph within the meaning of the Telegraph Acts, 1863 and 1869, and that a conversation over it was a "communication transmitted by a telegraph." This Court is asked to take up the problem exactly as there laid down, adding the words "without the aid of any wire" in s. 1, sub-s. 7, of the Act of 1904. The loud-speaker was essentially an instrument of telegraphy and not of wireless. There must be some limit to the meaning of "works," and it must be found in defining it as the operation of those who control the apparatus—namely, the landlords. The respondent was using but not working wireless apparatus.

[GODDARD J. Was this an offence, not by the respondent, but a breach of the regulations by the landlords?]

Perhaps. The proper way to deal with this state of things is for the Postmaster-General to impose conditions on the use of wireless.

Sir Terence O'Connor S.-G. in reply. Wireless telegraphy is where the point of transmission and the point of reception are not connected by wire—see the definition of "wireless telegraphy" in s. 1, sub-s. 7, of the Act of 1904 (2). Those points were not so connected here. The respondent "worked" his apparatus to get the message transmitted by wireless.

LORD HEWART C.J. This is a case stated by one of the magistrates of the police courts of the Metropolis. It arises out of an information preferred by the present appellant against the present respondent, charging him with unlawfully working apparatus for wireless telegraphy without a licence, contrary to s. 1, sub-s. 3, of the Wireless Telegraphy Act, 1904. The learned magistrate, having heard the evidence, dismissed the information, and the question for this Court is whether, in coming to that conclusion, he came to an erroneous decision in point of law.

The relevant facts may be very briefly repeated. The respondent was at the material time occupier and tenant of certain premises, which consisted of a self-contained flat,

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(1) 6 Q. B. D. 244.

(2) See note (1) ante, p. 811.

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being one of a block of similar flats, all the property of the same landlords. Then the case says: "There were installed in separate premises in the said block of flats occupied solely by the landlords, their servants or agents, two wireless receiving sets for which the landlords were liable to pay the 10s. receiving licence. Each of the said receiving sets was fitted with an amplifier which was connected by wires to a corresponding socket installed in each of the said flats, including the said premises occupied by the respondent. In the said premises the respondent had installed a loud-speaker fitted with a wire and a plug, which said plug he had from time to time during the period mentioned in the information inserted into one or other of the said sockets and had thereby received the broadcast programme" from one station or another. "It was not possible," the case finds, "for the respondent to obtain reception of broadcast programmes through the said loud-speaker without inserting the said plug into one or other of the said sockets." The respondent himself had no licence. Finally, the case finds that "The operation and tuning of the two receiving sets were under the control of the landlords, their servants or agents. The said sets were switched off every night at 11 P.M."

In those circumstances it was contended on behalf of the appellant, among other things, that the loud-speaker, wire and plugs installed in the particular flat were apparatus for wireless telegraphy within the meaning of s. 1, sub-s. 3, of the statute. But the contention did not end there; it was submitted further "that the respondent had worked the loud-speaker within the meaning of the said Act by placing the plug attached to the loud-speaker into the sockets and thereby receiving broadcast wireless programmes"; and finally "it was contended that the fact that the loud-speaker when working was connected by wires to one of the two receiving sets was immaterial for the reason that all messages passing along the said wires were wireless telegraphy within the meaning of the Act and the Wireless Telegraphy (Explanation) Act, 1925."

Those were the contentions on behalf of the appellant, and, per contra, it was contended for the respondent that the loud-speaker was not apparatus, but was an instrument; that the act of placing the plug into the socket did not constitute a working of the loud-speaker; that the two receiving sets constituted the apparatus for receiving wireless telegraphy; and that the tuning and switching on and off of the two receiving sets constituted the working of the apparatus within the meaning of the Act.

The learned magistrate has annexed to the case a copy of his judgment. It is a brief judgment, which has already been read and need not be read again, but the point of it is to be found in a single sentence. He came to the conclusion that the word "working" must mean tuning in; not merely that the tuning in was working, but that there was no other working but tuning in. In my opinion, that construction of the law as applied to these facts was erroneous.

The case has, I need hardly say, been argued before us with great skill and care, and I imagine that every point on both sides has been taken. The important words, for the purposes of this case, are to be found in s. 1, sub-s. 3, of the Act of 1904: "If any person . . . . works any apparatus for wireless telegraphy without a licence" he shall be guilty of an offence, and the matter, it is said, is complicated or illustrated by the subsequent definition in sub-s. 7, which, in describing what wireless telegraphy is, employs the words "without the aid of any wire." The argument of substance is that at the point where this respondent did what he did, the working or, intransitively, the operation of the wireless part of the matter had come to an end, and that what he did was to add a new something to that apparatus, to wit, a wire, which was no part of the wireless apparatus. Now it seems to me that that is an extremely unreal view of the matter. What was this respondent doing? In his own flat and without a licence, he was seeking to have the advantage of the transmission of a wireless message from somewhere. As long as he did nothing the message for him had no existence. In order to make the message reach him and be real to him, he had to do the particular acts, or one of them, mentioned in the case. What was he doing then? He was undoubtedly making use, in the last stage of a very long journey, of a wire; but the function of that wire was manifestly to make the transmission of the wireless message useful for him. It seems to me to be perfectly immaterial that in the last fraction of that path, whether the path was a mile long or 1000 miles long, he used a bit of wire. He was doing what he did in order to work the wireless apparatus. By that means he was tapping the wireless apparatus which transmitted wireless messages, and although it may well be that in the year 1904, when the Wireless Telegraphy Act was passed, the Legislature had no conception of any such process or method, nevertheless that is of no importance if, by the words that were employed, the Legislature brought such a proceeding within the net. Attractive as Mr. Maxwell Fyfe's ingenious argument has been, I am satisfied that what happened here is within the meaning of the words, "working any apparatus for wireless telegraphy." It seems to me that it can be put in various ways, but in particular in two: firstly, that in the circumstances the particular part of the totality of the apparatus which this respondent was using or working was apparatus for wireless telegraphy; but secondly, and still more so, that the whole purpose and meaning of that last element in the total transaction was to set to work for him and make useful to him a transmission of the wireless messages, which had involved the working of the apparatus as a whole. I cannot help thinking that the view which the learned magistrate took of the matter was altogether too narrow. No doubt, of course, tuning in is to work the apparatus, but it is quite a different proposition to say that there is no working of the apparatus other than tuning in.

In my opinion, therefore, this appeal ought to succeed, and the case ought to go back to the learned magistrate with the direction that the offence which was charged was proved.

SWIFT J. The loud-speaker which was in the respondent's flat would have been absolutely useless for the purpose of receiving wireless messages unless it was part of some other apparatus. In order to make it part of some apparatus it was connected with a receiver down in the basement by means of a wire, and the two things together made the apparatus by which Mr. Bull received wireless messages, and it seems to me that in joining the two parts of the machinery together, which enabled him to hear the message, he was working an apparatus for the reception of wireless messages. I therefore agree that this case must go back to be dealt with in the way my Lord has indicated, for the reasons which my Lord has given.

GODDARD J. I agree.

Appeal allowed.

Solicitor for appellant : *Solicitor to Post Office.*
Solicitors for respondent : *Perowne & Co.*

W. L. L. B.

C. A.

1937
March 2.

BYRNE *v.* DEANE.

[1935. B. 3406.]

Defamation—Libel—Publication—Notice put up on wall of club—Failure by owners of club to take notice down—Suggestion that some one had reported certain wrongful acts to police—Whether words were capable of a defamatory meaning—Whether the owners of club by failing to take notice down had published the libel.

The plaintiff was a member of a golf club of which the two defendants were the proprietors and the female defendant also the secretary. One of the rules of the club provided that "no notice or placard shall be posted in the club premises without the consent of the secretary." Certain automatic gambling machines had been kept by the defendants on the club premises for the use of the members of the club. Some one gave information to the police, with the result that the machines were removed from the club premises. On the following day some one put up on the wall of the club a typewritten paper containing the following verse:—

"For many years upon this spot
"You heard the sound of a merry bell
"Those who were rash and those who were not
"Lost and made a spot of cash
"But he who gave the game away
"May he byrnn in hell and rue the day."

The word "byrnn" was blacked out in the original and the word "burn" substituted for it. The plaintiff brought a libel action against the two defendants alleging that they had published the words in the notice of and concerning him to the members of the club. He alleged that the words meant that he had reported to the police the existence of the machines upon the club premises and that he had been guilty of underhand disloyalty to the members of the club. Hilbery J. held that the words were defamatory of the plaintiff, and that as the defendants had complete control of the walls of the club and could have removed the paper after they had seen it, the publication had been made with their approval, and he awarded the plaintiff nominal damages. On an appeal by the defendants:—

Held, by Slesser and Greene L.JJ., Greer L.J. dissenting, reversing Hilbery J., that the words were not capable of a defamatory meaning. To say of a man that he had put in motion the proper machinery for suppressing crime could not on the face of it be defamatory.

Per Greer L.J. that the words were defamatory of the plaintiff, and that the two defendants by allowing the defamatory statement to remain on the wall of the club were taking part in the publication of it.

Per Slesser L.J. that there was no evidence of publication by the male defendant, as the affairs of the club were by its rules managed by a committee of seven members; but that there was some evidence of publication by the female defendant.

Per Greene L.J. that there was evidence of publication of the libel by both the defendants.

APPEAL from a decision of Hilbery J. in an action tried at Lewes Assizes.

The plaintiff, Edmund Joseph Byrne, was a member of the Seaford Head Golf Club, and the two defendants, Robert Heward Deane and his wife Aletta Felicia Deane, were the proprietors and sole directors of the club, and the female defendant was also the secretary of the club.

Rule 2 of the rules of the club provided: "No member of the club or of the committee who is not also a director shall be under any liability whatsoever, or become liable or responsible for any expense in respect of the club."

Rule 3: "The affairs of the club shall be managed by a committee of seven members."

Rule 12: "No notice or placard, written or printed, shall be posted in the club premises without the consent of the secretary."

Certain automatic machines known as "diddler" machines which were gambling machines had been kept by the defendants upon the club premises since the year 1932 for the use of the members of the club. They were profitable machines for the proprietors of the club, who did not own the machines, but who received a share of the profits of the machines for allowing them to be on the club premises. Some one gave information to the police as to the existence of these machines on the club premises which led the police on August 26, 1935, to make a complaint to the defendants, and to require them to remove the diddler machines, and the defendants thereupon removed the machines from the club premises.

On August 27 some one put up on the wall of the club against which the automatic machines had formerly stood a typewritten paper containing the following doggerel verse:—

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" For many years upon this spot
" You heard the sound of a merry bell
" Those who were rash and those who were not
" Lost and made a spot of cash
" But he who gave the game away
" May he byrnn in hell and rue the day
" Diddleramus."

The word " byrnn " was blacked out in the original typescript and the word " burn " substituted for it, but under the typescript there was a carbon copy in which the word remained " byrnn " and any person desiring to see what the word was which had been obliterated in the typescript had only to lift up the typescript and look at the carbon copy underneath.

The plaintiff brought a libel action against the two defendants alleging that they had published or caused to be published the words in the notice of and concerning him to the members of the club.

He alleged in para. 6 of the statement of claim that " by the said words the defendants meant and were understood to mean that the plaintiff had reported to the police the presence of the said machines upon the said premises, that he was guilty of underhand disloyalty to the defendants and his fellow members of the said club and that by reason of the said facts his conduct was deserving of the gravest censure, that he was a person devoid of all true sporting spirit, and further that he was a person unfit for other members of the club to associate with and should be ostracised by them."

The defendants admitted that they saw the notice on the wall, but denied having written it or put it there. The female defendant said at the trial that as secretary she was responsible for consenting to any notices that were posted in the club, and that she might have removed the verse if she had thought it harmful, but she thought that one member of the club was poking fun at another.

Hilbery J. held that the words of the notice were defamatory of the plaintiff and that as the defendants had complete control of the walls of the club and could have taken down the paper after they had seen it, the continued publication to all such persons as should come into the club and see the writing could only have been done with their approval. He accordingly gave judgment for the plaintiff for 40s. damages and costs.

The defendants appealed.

Tristram Beresford K.C. and *Harold J. Brown* for the appellants. This case raises a point upon which there is no authority —namely, whether if the occupier of a house sees something upon the walls of his house which has been put there by some other person, and which may be a libel upon a third person, and does not remove it, he can be said to have published the libel himself. Rule 12 of the club rules upon which the plaintiff relied ought not to be construed so as to mean that the notice must be deemed to have been authorized by Mrs. Deane, the secretary of the club, because according to the rule it could not have been put up without her consent. In fact it was put up without her consent or knowledge. It was never suggested at the trial that the lampoon was either written or put up by either of the defendants. It was, however, said that Mrs. Deane was liable because she did not take the notice down after she saw it on the wall. It is said that allowing the libel to remain on the wall after reading it amounted to a publication of the libel by the two defendants. "Publication" was defined by Lord Esher M.R. in *Pullman* v. *Hill & Co.* (1) as "The making known the defamatory matter after it has been written to some person other than the person of whom it is written." If some one puts a libel upon the wall of a house, and the occupier of the house knows it is there and does not remove it, he cannot be said to have published the libel. If the libel has been cut into the stonework of the house the occupier when he sees the libel is surely not obliged to reface the stonework of his house or pull the wall down, with the alternative that if he does not do that he will be liable for the publication of the libel.

(1) [1891] 1 Q. B. 524, 527.

[GREENE L.J. The answer must depend upon the facts of each particular case as it arises.]

In the present case there never was any publication by the two defendants, and the fact that they allowed the lampoon to remain on the wall of the club for some days cannot amount to publication. A man does not publish a libel which he sees upon the walls of his house because he does not remove it. If, however, he draws the attention of passers-by to the libel he is adopting it and republishing it. But merely permitting the libel to remain on the wall without doing an overt act cannot amount to a publication of the libel. By rule 3 of the club rules the affairs of the club are managed by a committee of seven members. That included the control of the club premises and of notices exhibited on the club walls, and therefore the male defendant cannot be held responsible for the publication of this libel.

These words are not defamatory. To amount to a libel the words must tend to lower the plaintiff in the estimation of society generally. If the words only tend to bring the plaintiff into odium, ridicule or contempt with a particular class or section of society, they are not libellous. A fortiori the words are not libellous if the standard of opinion of such limited class or section of society is one which the Courts cannot recognize or approve: see Gatley on Libel and Slander, 2nd ed., p. 15.

[GREER L.J. referred to *Tolley* v. *J. S. Fry & Co., Ld.* (1)]

That case was a very different case from the present one. In *Mawe* v. *Pigott* (2) an Irish priest sued for words charging him with being an informer against a certain class of Irish criminals. Counsel for plaintiff argued that, amongst certain classes who were either themselves criminal, or who sympathized with crime, it would expose a person to great odium to represent him as an informer, or a prosecutor, or otherwise acting in the detection of crime. The Court in a judgment delivered by Lawson J. said (3): "That is quite true, but we cannot be called upon to adopt that standard. The very circumstances which will make a person be regarded with disfavour by the criminal classes will raise his character in the estimation of right-thinking men. We can only regard the estimation in which a man is held by society generally." In the present case, assuming that the plaintiff gave information to the police of the existence of these gaming machines in this club, he would only be doing something which a good citizen would do. The putting up on the walls of the club of a notice that the police had been informed by Byrne would not be a libel upon him, as it would be merely saying that he did what it was his duty as a good citizen to do. What has to be considered is what society generally thought about the matter and not what the members of the club thought about it. The use of these machines amounted to criminal gambling, for which clubs are prosecuted every day. Whoever gave information to the police was only acting as a good citizen. There could be nothing improper in conveying information to the police.

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(1) [1931] A. C. 333.
(2) (1869) Ir. R. 4 C. L. 54.
(3) Ir. R. 4 C. L. 62.

[GREENE L.J. Suppose a man were a member of this club and also of an anti-gambling club. He might bring actions for libel in respect of two diametrically opposite notices. That would certainly be a curious result.]

John Flowers K.C. and *G. A. Thesiger* for the respondent. In the history of this matter it is important to remember that Deane was very angry with Byrne because Byrne communicated to the authorities that Deane was cutting gorse on the golf course near to Byrne's house. Deane told Byrne that if he was not satisfied he might go to another golf club. That is important having regard to the fact that Deane did not take down the lampoon from the wall when he saw it. Deane said he wondered whether Byrne would see it and put the cap on, and therefore it was present to his mind that it might refer to Byrne, and nevertheless he allowed it to remain on the wall of the club. Deane was the proprietor of the club and one of its two directors, and therefore he might have removed it. It is stated in *Rex* v. *Paine* (1) and again in *Reg.* v. *Drake* (2) that "if one repeat and another write a libel, and a third approve what is wrote, they are all makers of it." Having

(1) (1694) 5 Mod. 163, 167.

(2) (1706) Holt K. B. 426.

regard to the position held by the defendants, they having the control of the premises, there was a definite act by them in leaving the lampoon up on the wall of the club. The rule that a committee of seven had control could be altered. The point was not taken in the Court below that only the committee could remove the lampoon; the point taken there was that there was no publication by the defendants, because leaving the notice up on the wall did not amount to publication.

[SLESSER L.J. In *Hird* v. *Wood* (1) the defendant sat on a stool near a placard which had been put up on the roadway containing defamatory matter. He remained there for a long time smoking a pipe and he continually pointed at the placard with his finger and thereby attracted to it the attention of all who passed by. It was held by Pollock B. that there was no evidence of publication, but the Court of Appeal held that there was evidence of publication and ordered a new trial.]

If defamatory matter is left on the wall of premises by a person who has the power to remove the defamatory matter from the wall he can be said to have published the defamatory matter to the persons who read it. In the case of *De Libellis Famosis* (2) Lord Coke points out the various ways a libel may be published and instances the fixing some disparaging object at the party's door.

[SLESSER L.J. referred to *Halliwood's Case* (3) in the Star Chamber, where it was resolved that if one finds a libel, and would keep himself out of danger, if it be composed against a private man, the finder may either burn it or deliver it to a magistrate.]

It is stated in Starkie's Law of Slander and Libel, 2nd ed., vol. ii., p. 225, that "According to the general rule of law, it is clear that all who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication" and at p. 239 "Upon the whole, ... it seems to be perfectly clear that every person who maliciously lends his aid to the construction of a libel, subsequently published, or who contributes to the publication of one already made, with a knowledge of its contents, is indictable as a principal for the whole mischief produced." Mr. Deane knew for two or three days that the libel was on the wall and did nothing. Leaving the notice on the wall amounted to an overt act by the two defendants so that they are responsible for the publication of this libel.

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(1) (1894) 38 Sol. J. 234.

(2) (1605) 5 Coke, 125*a*.

(3) (1601) referred to in 5 Coke, 125*b*.

This lampoon is capable of a defamatory meaning. It is true that there is a duty upon every one to report to the police the commission of a felony, otherwise the person who fails to do so may become an accessory to the crime; but there is no duty to report the commission of a misdemeanour, and keeping these diddler machines on the club premises only amounted to a misdemeanour. The sting of the libel in this case is that it alleges that the plaintiff has been disloyal to the fellow members of his club. All clubmen would regard the alleged conduct of the plaintiff as one of disloyalty to his club. In deciding whether words are capable of a defamatory meaning one must look at all the circumstances of the case. It may be a libel to say that a man reported a certain matter to the police. In *Graham* v. *Roy* (1) it was held by the Court of Session in Scotland that the propagation of a report, that a person had given information to the officers of Excise against a distiller, and assumed the office of a common informer in order that he might obtain one-half of the penalties awarded, afforded relevant ground for a claim for damages. In that case it was raised by the defence that "an informer was a legal officer, and it was not slander in the eye of the law to say that a man gave information which had the effect of repressing an illegal act, such as smuggling." Lord Fullerton there said (2): "If you publish on the streets of a town that a man is a common informer, is that not slander? It may be perfectly legitimate to give information, but an informer is by no means a popular character." In *Winn* v. *Quillan* (3) an action of damages for slander was raised in which the pursuer averred that the defender had repeatedly designated him to others as an informer, thereby representing that he was "a man who for the sake of reward, and from sinister and disreputable motives had betrayed his fellows, and disclosed secrets or given information to the Crown or its executive against Irishmen and others," and it was held by the Court of Session that the action was relevant, and an issue allowed with an innuendo in the above terms.

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(1) (1851) 13 D. 634.
(2) Ibid. 636.
(3) (1899) 37 Sc. L. R. 38.

[SLESSER L.J. Those cases are inconsistent with *Mawe* v. *Pigott* (1), where it was held that to call a man an informer was not defamatory.]

[GREER L.J. Lord Tomlin in *Tolley* v. *J. S. Fry & Co., Ld.*, said (2): "Regarded in vacuo it is admittedly innocent, but the question remains whether it is capable of a defamatory meaning by reason of the circumstances surrounding its publication."]

In considering whether these words are capable of a defamatory meaning one must look, first, at the words themselves, and, secondly, at the circumstances under which they were published. In our submission the words were capable of a defamatory meaning, and were published by both defendants of and concerning the plaintiff. The appeal ought therefore to be dismissed.

Harold J. Brown in reply. The plaintiff in effect is saying that the defendants did nothing; that although they did not put the lampoon on the wall they refrained from taking it down from the wall. The plaintiff alleges that there was a duty upon the defendants to prevent the libel being seen by any one. The distinction between positive and negative rights is pointed out by Sir John Salmond in his work on Jurisprudence, 8th ed., § 80, where he says, p. 258, that "while liability for hurtful acts of commission is the general rule, liability for acts of omission is the exception." There may be a publication of a libel through negligence, but in that case the publication is a positive act. It is said that the defendants have published the libel by allowing it to remain on the wall—that means that they have not done the positive act of taking it down. The presence of the diddler machines on the club premises made it a gaming-house, and any one resorting thereto was liable to be prosecuted and bound over. The giving information to the police of the existence of the diddler machines was the act of a good citizen, and was something which the person giving the information was entitled to do for his own protection.

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(1) Ir. R. 4 C. L. 54.

(2) [1931] A. C. 350.

[GREENE L.J. A difficulty in the case is that the law requires a standard of duty which is different from that which a large number of people regard as being the proper standard. Can this Court regard any other standard than that which the Legislature has laid down ?]

The law cannot regard the opinion of a limited class of people like the members of a club, but only that of the average reasonable man. In *Myroft* v. *Sleight* (1) McCardie J. said that " the words complained of must be such as would injure the plaintiff's reputation in the minds of ordinary, just and reasonable citizens." Lord Atkin in *Sim* v. *Stretch* (2) propounded the following test : " Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally ? "

[SLESSER L.J. referred to *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ld.* (3)]

Every word of the innuendo in the present case would be applicable to a burglars' club.

GREER L.J. This appeal raises two points, both of which are difficult questions, and as the judgments of each of the three members of this Court differ it is possible for reasonable men to differ with regard to those questions.

The action was brought to recover damages for libel. The learned judge came to the conclusion that the words complained of were defamatory of the plaintiff and that as the defendants allowed the notice to remain on the walls of the club, over which they had complete control, after they had seen it the publication of it was made with their approval, and that they had therefore published the libel. He

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(1) (1921) 90 L. J. (K. B.) 883, 886.

(2) (1936) 52 T. L. R. 669, 671.

(3) (1934) 50 T. L. R. 581.

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accordingly gave judgment for the plaintiff for nominal damages and costs. The two defendants appeal from that decision, and they do so on two grounds—namely, first, that the words complained of were not defamatory, and secondly, that there had been no publication of the libel by either of the defendants. If either of those grounds is correct the appeal must succeed. In my opinion the decision of the learned judge was right upon both these points.

The publication complained of was of something which is commonly called a lampoon, which was put up on the walls—not on the notice-board—of a proprietary club, and which was in these words :—

" For many years upon this spot
" You heard the sound of a merry bell
" Those who were rash and those who were not
" Lost and made a spot of cash
" But he who gave the game away
" May he burn in hell and rue the day
" Diddleramus."

The word " burn " was originally spelt " byrnn," but at some time before the male defendant saw the notice the word was altered to " burn." But there cannot be the slightest doubt but that the members of the club who read the lampoon associated it with the plaintiff, as did also the two defendants. In my opinion it is immaterial that the word " byrnn " was subsequently spelt " burn."

Two questions arise in this case: (1.) Was the learned judge right in holding that the words were capable of a defamatory meaning? and (2.) Was he right in holding that they were published by the defendants of and concerning the plaintiff?

What happened was that in the year 1932 two machines had been installed in this club, which are called fruit machines, they are also called " diddler " machines. The person operating one of these machines puts a coin in and pulls a handle; if the machine stops at a certain spot it releases more coins than were put in. They were undoubtedly gaming machines.

Mr. Byrne, who complains of the lampoon, and that is the

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basis of the case, said that the words that were published referred to him, and he established that contention to the satisfaction of the learned judge.

It is said by counsel for the defendants that there is no evidence before the learned judge on which he could find that the two defendants published this defamatory statement. Now the position as regards that was this: it was not put up on the wall by either of the two defendants. It was put on the wall by somebody else, probably by some member of the club; but undoubtedly the secretary of the club under the powers given to her by rule 12, she not having consented to it being put up, was entitled to take it down. By allowing the lampoon to remain upon the wall when she had not consented to its being put up, and therefore could have taken it down, she was a consenting party to the defamatory statement, if it was defamatory, remaining upon the wall of the club. She and her husband, as it is pleaded, were directors and proprietors of this club. It was a proprietary club. The difference between a proprietary club and an ordinary club is that in a proprietary club the proprietor or proprietors remain in possession of the club. The two defendants are the lessees of the club and they are the occupiers of the club premises, and the walls are their walls, and in my judgment they allowed a defamatory statement to be put up on their walls and to remain on their walls in a position in which it could be read by anybody who came into the club. Undoubtedly it must have been so read not only by people who were members of the club but by people who were not members of the club, and who only came in possibly for a drink with a member or to play a game of some sort or another.

Quite a number of illustrations have been put forward as illustrations which give rise to similar questions to the question that arises in this case. In my judgment the nearest case put forward is this: assume that a defamatory poster was hung upon the garden rail of Mr. Smith's house which adjoins the street so that the defamatory statement can be read by every one who passes the house. Could it not be said that by allowing that poster to remain hanging upon the garden

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rail of his house the occupier of the house was taking part in the publication of that poster to people passing his house, when the simplest operation in the world, namely, cutting the rope by which the poster was hung upon the rail and taking the poster away, would have made the poster from that time innocuous ? In my judgment the two proprietors of this establishment by allowing the defamatory statement, if it be defamatory, to rest upon their wall and not to remove it, with the knowledge that they must have had that by not removing it it would be read by people to whom it would convey such meaning as it had, were taking part in the publication of it.

The second question is, in my opinion, one of much greater difficulty, and it is this : Was the statement defamatory ? There is no question but that it did in fact refer to the plaintiff, and the defamatory part of it, in my judgment, is contained in the words : "But he who gave the game away May he burn in Hell and rue the day." It does not seem to me that that statement was correctly interpreted in the innuendo, because the plaintiff may rely upon the natural meaning of the words, quite apart from the innuendo. One must distinguish between the question as to what a defamatory statement means, and the question whether that defamatory statement is or is not true. It may well be, if it had been necessary to deal with the matter, that it might have been said by the plaintiff that the defamatory statement was not true because he had not been guilty of any disloyalty to his fellow members because he had only done that which was his duty. But that is not the question. The question is, What is the meaning which any reasonable man would attach to the statement contained in this document ? In my judgment the statement in the document in question is a statement that the plaintiff who gave the game away was guilty of disloyalty to his fellow members of the club. Whether that was justified or not is quite another matter. That it would be regarded by any reasonable person as defamatory to say of a man that he was guilty of disloyalty to the fellow members of the club to which he belonged I do not think

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there is any question. It would in my judgment be a defamatory statement which would entitle him to bring an action in order to recover damages quite independently of the innuendo. But if it is necessary to go to the innuendo I find in the innuendo this statement, that the words meant, amongst other things, that he was guilty of underhand disloyalty to the defendants and his fellow members of the club. In my judgment the words are capable of that meaning, and the learned judge was entitled to decide that that is what they did mean, and we need not consider whether or not the facts when proved would show that that statement was wholly unfounded, that is to say that it was not true. We have not got to consider that. We have only got to consider what the words would convey to an ordinary reasonable member of the club, and in my judgment they would convey either in their natural meaning or as stated in the innuendo that the plaintiff had been guilty of underhand disloyalty to the defendants and his fellow members of the club, and that therefore the learned judge was justified in finding not only that the words were capable of a defamatory meaning but that they were defamatory of the plaintiff.

I have not thought it necessary to refer to the various cases that have been cited. [I am inclined to think that the Scottish judges were right in thinking that it does damage a man in the eyes of reasonable persons to call him an informer.] If one had to choose between the Scottish cases and the Irish case I should follow the Scottish cases.

For the reasons I have given I think the learned judge was right on both points and that the judgment that he gave for the plaintiff for 40*s.* and costs ought not to be reversed by this Court; but I am afraid, as my brothers are of a different opinion, quite possibly for other reasons but that will not matter, the appeal will be dealt with as they state.

SLESSER L.J. In this case, as my Lord has indicated, I regret to say that I have come to a conclusion different from that at which he has arrived.

My conclusion in this appeal in part applies to both the defendants and in part only to one of them in thinking that the appeal must be allowed and, therefore, it will be convenient first to deal with that aspect of the case which applies to both defendants. That part of the case concerns the question whether these words which appear in this doggerel verse can properly be held to be defamatory of the plaintiff at all—in other words whether, had there been a jury in this case, there would have been any case to go to the jury?

In my opinion, the words as set out in the statement of claim cannot on any view be taken to be defamatory apart from the innuendo. I do not think that, taken by themselves, they form any ground of complaint, and, as I understand the case, it was treated upon the basis that the innuendo contained the alleged defamatory meaning of these words, and not the words in their natural and ordinary meaning. That innuendo is thus pleaded in para. 6 of the statement of claim: "By the said words the defendants meant and were understood to mean that the plaintiff had reported to the police the presence of the said machines upon the said premises, that he was guilty of underhand disloyalty to the defendants and his fellow members of the said club and that by reason of the said facts his conduct was deserving of the gravest censure, that he was a person devoid of all true sporting spirit, and further that he was a person unfit for other members of the club to associate with and should be ostracised by them."

I read that innuendo to mean that all the consequent disfavours which it is alleged the plaintiff might suffer at the hands of his fellow members of the club would be due and due only to the fact that he had "reported to the police the presence of the said machines upon the said premises," and so, that being the meaning, of course the natural objections on the part of his fellow members would follow.

Now, in my view, to say or to allege of a man—and for this purpose, as my Lord has said, it does not matter whether the allegation is true or is not true—that he has reported certain acts, wrongful in law, to the police, cannot possibly be said to be defamatory of him in the minds of the general public.

We have to consider in this connection the arbitrium boni, the view which would be taken by the ordinary good and worthy subject of the King, and I have assigned to myself no other criterion than what a good and worthy subject of the King would think of some person of whom it had been said that he had put the law into motion against wrongdoers, in considering that such a good and worthy subject would not consider such an allegation in itself to be defamatory.

That is the view, as I read it, which was taken by McCardie J. in *Myroft* v. *Sleight* (1), where he quotes with approval a judgment of the Irish Court in *Mawe* v. *Pigott* (2), where Lawson J. giving the judgment of the Court says this: Counsel for the plaintiff, " however, argued that amongst certain classes who were either themselves criminal, or who sympathised with crime, it would expose a person to great odium to represent him as an informer or a prosecutor, or otherwise aiding in the detection of crime; that is quite true, but we cannot be called upon to adopt that standard. The very circumstances which will make a person be regarded with disfavour by the criminal classes will raise his character in the estimation of right-thinking men. We can only regard the estimation in which a man is held by society generally."

Now, it is true that there have been cited to us certain decisions in the Court of Session, which appear on the face of them to take a different view. In the first Scottish case cited to us, namely, *Graham* v. *Roy* (3), the actual word which was used about the plaintiff was the word " informer," which it was said had or might have a sinister meaning as regards himself. I do not think it necessary in this case to express a decided opinion about the Scottish cases; but I do find it difficult to understand how, so long as the law regards the office of public informer as one to be continued in being

(1) 90 L. J. (K. B.) 883.
(2) Ir. R. 4 C. L. 54, 62.
(3) 13 D. 634.

and one to be protected by the law and recognized, and in certain cases to be productive of reward, it can be said that to call a person by a name which suggests that temporarily he is promoting the interests of the law, is defamatory. But however that may be, it has been argued here that these words in the present case cannot really be said to be defamatory because in substance the crime which it is suggested in the libel that this gentleman is endeavouring to prevent is really of so trivial a character, and one which is so popular with the mass of the people, that to prevent an innocent indulgence in the use of these machines, which have been described as " diddlers " and also as " fruit " machines, is not preventing a crime, the whole thing is so trivial, and that the real substance of the case is the dislike and animosity which must be created in the minds of his fellow members of the club against the plaintiff. I find it quite impossible, speaking for myself, to draw a distinction between one crime and another in this particular. In no case as it seems to me can it be said that merely to say of a man that he has given information which will result in the ending of a criminal act is in itself defamatory where he is doing no more than reporting to the police that which if known by the police might well end in the discovery of an illegal act and its suppression. For that reason I am unable to see that here there would have been any case to leave to the jury on that head.

I pass, shortly, to the other matter which is not essential to my decision. If my view that these words are incapable of a defamatory meaning is the right view, it concludes this appeal in favour of the appellants; but I will add that also in my view the plaintiff has failed to show a publication against the male defendant. With regard to the female defendant I think it may be said—although it is perhaps extending the evidence of publication rather further than has ever been done in the past in any case which I have been able to discover—that there was some evidence of publication on the part of the female defendant. There are cases which go to show that persons who themselves take no overt part in the publication of defamatory matter may nevertheless so adopt and promote the reading of the defamatory matter as to constitute themselves liable for the publication. Such was the case of *Hird* v. *Wood*. (1) There some person unknown had suspended a placard between two poles on the roadway near a gate leading into certain grounds. There was no evidence as to who wrote the words on the placard or who put it up on the roadway; but it was proved that the defendant took up his position near the placard, and remained there for a long time, sitting on a stool and smoking a pipe, and that he continually pointed at the placard with his finger, and thereby attracted to it the attention of all who passed by. The plaintiff complained of this conduct on the part of the defendant as constituting a publication by him of a defamatory statement of and concerning the plaintiff. The matter was sufficiently doubtful that, when it came before Pollock B. and a jury the learned judge held that there was no evidence of publication; but on appeal this Court, consisting of Lord Esher M.R., Lopes and Davey L.JJ., held that that constituted evidence of publication.

Now the evidence of publication here of the female defendant appears to be this, that she was the secretary of this club and that under rule 12 of the Club Rules it was provided that: "No notice or placard, written or printed, shall be posted in the club premises without the consent of the secretary," and her evidence is to this effect, that she knew that this alleged libel had been placed on the wall of the club. Her view was that she could see no harm in it. She said: "I read it. It seemed to me somebody was rather annoyed with somebody." I think having read it, and having dominion over the walls of the club as far as the posting of notices was concerned, it could properly be said that there was some evidence that she did promote and associate herself with the continuance of the publication in the circumstances after the date when she knew that the publication had been made. But with regard to the male defendant I am unable to see that there was any evidence that he was in any way responsible for the publication. It is

(1) 38 Sol. J. 234.

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true that this club is a proprietary club. It is true that he was a part-lessee of the premises; but in my view he had so arranged matters that by the contract which is contained in the rules he had provided in rule 3 that: "The affairs of the club shall be managed by a committee of seven members," and that committee was to have power to make and amend the regulations and by-laws with the assent of the directors. That power was apparently shared by the directors, that is the two defendants, and the committee could with their assent from time to time make and alter the by-laws as seemed right to them. But taking the matter as it was at the moment when this alleged libellous publication was made, I think that the affairs of the club, including the control of any posters which might be placed on the walls, had passed if not entirely to the female defendant at any rate to her so far as the putting up of notices was concerned, and to her and the committee so far as the control of the affairs of the club is concerned, and it does not seem to me it would be proper to say that none the less in spite of this, in order to stop this publication, the directors of the club, the male and female defendants, might have altered the rules and taken the control of the club and its affairs out of the hands of the committee in order to pull down the notice. I think that is altogether a too remote and hypothetical question, leading as it might well do to a revolution in the club, resulting in the resignation of all the members, and although there is apparently a power under rule 3 (*b*) in the committee to make and amend the regulations and by-laws with the consent of the directors, and alter the constitution, I think that that is altogether too remote a matter to take into consideration and, therefore, as I have said, I think there is no evidence of publication against the male defendant.

For these reasons, because there is no defamatory matter shown, the appeal should be allowed in my view in favour of both defendants, and, were the matter defamatory and if I am wrong on that point, the appeal should, I think, be allowed on behalf of the male defendant for want of publication by him.

GREENE L.J. On the issue of publication I agree that there was evidence of publication by both the defendants. I agree with my brother, Greer L.J., that no distinction is to be drawn between the two defendants for the reasons which he gave. To those reasons I may add these considerations: first of all, the suggested distinction was not taken by the present appellants in the Court below. But however that may be, the affixing of this notice to the walls of the defendants' property, as it was not authorized by the rules of the club, was in fact a trespass, and they were entitled as proprietors to remove the trespassing article from the walls. It was a matter which fell right outside the rules of the club; it was not authorized and, therefore, it appears to me that they had ample power, notwithstanding the position and rights of the committee, to remove something from their property the presence of which could not be justified under the rules.

I may also add, so far as any substance in the matter is concerned, that under rule 2 it is provided that: "No member of the club or of the committee who is not also a director shall be under any liability whatsoever, or become liable or responsible for any expense in respect of the club." The effect of that would be that if the committee were sued in respect of this matter and held liable the directors would be bound to indemnify them. Therefore, quite apart from the fact that I think they were rightly sued—even if that were not the case, and the committee had been sued, the directors would have been bound to indemnify them.

Now, on the substantial question of publication, publication, of course, is a question of fact, and it must depend on the circumstances in each case whether or not publication has taken place. It is said that as a general proposition where the act of the person alleged to have published a libel has not been any positive act, but has merely been the refraining from doing some act, he cannot be guilty of publication. I am quite unable to accept any such general proposition. It may very well be that in some circumstances a person, by refraining from removing or obliterating the defamatory

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matter, is not committing any publication at all. In other circumstances he may be doing so. The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?

I may give as an example of a case which would fall on one side of the line: suppose somebody with a mallet and a chisel carved on the stonework of somebody's house something defamatory, and carved it very deeply so that the removal of it could only be effected by taking down the stonework and replacing it with new stonework. In a case of that kind it appears to me that it would be very difficult, if not indeed impossible, to draw the inference that the volition of the owner of the house had anything to do with the continued presence of that inscription on his stonework. The circumstance that to remove it would require very great trouble and expense would be sufficient to answer any such aspersion.

On the other hand you have a case such as the present where the removal of this particular notice was a perfectly simple and easy thing to do involving no trouble whatsoever. The defendants, having the power of removing it and the right to remove it, and being able to do it without any difficulty at all, and knowing that members of the club when they came into the room would see it, I think must be taken to have elected deliberately to leave it there. The proper inference, therefore, in those circumstances it seems to me is that they were consenting parties to its continued presence on the spot where it had been put up. That being so it seems to me that they must be taken to have consented to its publication to each member who saw it. The learned judge so held, and not only do I think that there was evidence of publication on the facts of this case, but I agree with his conclusion on that matter.

Now with regard to the other matter in the case, namely, the question whether these words are defamatory, the point raised is one of importance and of difficulty. The alleged meaning of the words is set out in the innuendo which is pleaded. With regard to that innuendo it is to be observed that the learned judge in his judgment did not in terms, as I read it, accept that innuendo as it is drawn. Looking at his judgment I find that the meaning which he attributes to the words is this: that the plaintiff was the one who had informed the police and thereby lost for the members of the club the fun of the "diddler" machines, and then he says again: "I cannot help thinking that this did aim at Mr. Byrne the accusation that he had given information to the police." That is the only part of the innuendo which the learned judge in terms accepts. I should have thought myself, with great deference to those who think otherwise, that that is the meaning, in the circumstances, of the language used.

It is to be observed that the complaint in the lampoon is the complaint that the plaintiff gave the game away, and reading that in connection with the first four lines of the lampoon I should myself read it as meaning that he gave the game away with the result that the members were deprived of their sport.

When the innuendo is looked at, this is said: "that he was guilty of underhand disloyalty to the defendants and his fellow members of the said club," and so on. I read that myself in this sense: that he was guilty of disloyalty by reporting the matter to the police. If that be the true meaning of it, and if that be the meaning of the words, it does not appear to me that by adding the reference to disloyalty the matter is carried any further. If the allegation that he reported the matter to the police is not defamatory, in my judgment the allegation that in reporting the matter to the police he was guilty of disloyalty cannot be defamatory.

If that be right, the matter resolves itself into this: Are words capable of a defamatory meaning which say of the plaintiff that he reported to the police that on the club premises of which he was a member a criminal offence was being habitually committed? Now, it is said that the ordinary

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sense of society would say of a man who had done that in the case of this particular criminal offence that he had behaved in a disloyal and underhand fashion. It is said that this particular offence is one which can be looked at with an indulgent eye, and that there is something dishonourable in setting in motion the constitutional machinery provided in this country for the suppression of crime. I myself find it embarrassing to take into consideration questions of the way in which members of clubs might regard such an action. It seems to me that no distinction can be drawn between various categories of crime. I suggested in the course of the argument the case where members of a club were habitually engaged in having cock-fights conducted on the club premises, and I asked the question whether to say of a man that he had reported that to the police would be defamatory, and the answer that I got was not to my mind a satisfactory one. But to take the matter further: supposing in the club the members were engaged in habitually defrauding guests at cards, could it be said to be defamatory if a member of the club reported that to the police? and so on. It seems to me that if the argument is to be accepted it would involve the Court in this position: that it would have to differentiate between different kinds of crime and put in one category crimes which are of so bad a character as to call for universal reprobation even among the more easy-minded, and in another category crimes which many people think are stupid and ought never to have been made crimes at all.

It seems to me that, whatever may be the view of individuals on matters of that kind, this Court cannot draw a distinction of that description. In point of fact it may very well be that the Legislature in its wisdom has made into a crime something which the public conscience of many persons in this country does not consider involves any sort of moral reprobation; but this Court it seems to me cannot be concerned with considerations of that kind, and in my judgment to say of a man that he has put in motion the proper machinery for suppressing crime is a thing which cannot on the face of it be defamatory.

Reference was made to reports of two Scottish cases, *Graham* v. *Roy* (1) and *Winn* v. *Quillan* (2), in which the contrary appears to have been held. I myself do not find very great assistance from those cases. The judgments are not reasoned judgments; they are very shortly reported; they are cases that were dealt with at an interlocutory stage, and in one case, *Winn* v. *Quillan* (2), there was a dissent of Lord Young, and speaking for myself I do not find that those cases afford me any guidance, and in so far as anything that I have said in this judgment is inconsistent with those authorities, in my opinion they ought not to be followed for the reasons which I have given.

In my opinion, therefore, the words in question are not capable of a defamatory meaning, and on that ground I consider that the appeal should be allowed.

GREER L.J. I should like to add, in order to prevent any misconstruction of my judgment, that if I had come to the conclusion which Greene L.J. has come to—namely, that the only meaning of this lampoon was that the police had been informed by the plaintiff of what was going on, I should have been of the same opinion as he is that that was not defamatory. It was because the words contained something more than that, and they were not true because they were not a proper inference from the fact that the police had been informed. It is similar to a case in which there had been a statement that the police had been informed by the plaintiff and, therefore, the plaintiff was a blackguard. It would obviously be no answer in such a case as that to prove that informing the police did not make him a blackguard. It would still be defamatory of him to say that he was a blackguard, though the foundation for the statement was quite insufficient to prove that he was a blackguard.

It is only because I do not want my judgment to be misunderstood that I have made these additional observations. I think that if the proper meaning and the sole meaning of these words is that the police had been told by the plaintiff

(1) 13 D. 634.

(2) 37 Sc. L. R. 38.

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about what had been going on, then I would agree with Greene L.J. that there was nothing defamatory in the statement.

Appeal allowed.

Solicitors for appellants: *Gordon Gardiner, Carpenter & Co., for F. H. Carpenter & Veale, Brighton.*

Solicitors for respondent: *Barnes & Butler, for Hillman & Sons, Seaford.*

R. F. S.

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